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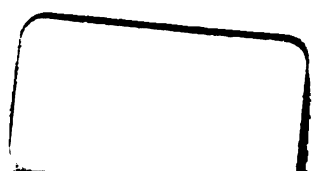
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
High Court of Chancery,

FROM THE YEAR MDCCCLXXXIX TO MDCCCXVII.

WITH A DIGESTED INDEX.

BY FRANCIS VESEY, JUN. ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

In Twenty Volumes.

VOL. III.

COMMENCING IN MICHAELMAS TERM, XXXVI GEO. III. ENDING IN EASTER TERM,
XXXVIII GEO. III.

FROM THE LAST LONDON EDITION, WITH THE NOTES OF FRANCIS VESEY, JUN. ESQ.
AND THE EXTENSIVE ANNOTATIONS OF JOHN E. HOVENDEN, ESQ.
OF GRAY'S INN, BARRISTER AT LAW.

THE WHOLE EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,

AND SUBSEQUENT ENGLISH DECISIONS,

BY
CHARLES SUMNER, ESQ.

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**LORD LOUGHBOROUGH, [afterwards EARL ROSSLYN,] Lord
Chancellor.**

**SIR RICHARD PEPPER ARDEN, [afterwards LORD ALVANLEY,]
Master of the Rolls.**

SIR JOHN SCOTT, Attorney General.

SIR JOHN MITFORD, Solicitor General.



CASES IN CHANCERY, ETC.

MICHAELMAS TERM.

[36 GEO. III. 1795.]

CALLOW, *Ex parte*.

[1795, Nov. 11.]

DEPENDANT at law having lain two months in prison was made a bankrupt, and discharged under a *supersedeas*, the Plaintiff not having proceeded for two Terms. The Plaintiff then proved his debt under the commission; and before a dividend took the bankrupt in execution in a fresh action: the bankrupt's petition for an order on the Plaintiff to release him was dismissed.

CALLOW was arrested for a debt of 31*l*. and continued in prison two months; upon which a commission of bankruptcy issued against him. The Plaintiff in the action, who was not the petitioning creditor, not having proceeded for two Terms, the bankrupt obtained a *supersedeas*, and was discharged. The creditor then proved his debt under the commission, and afterwards arrested the bankrupt in a second action, but soon discharged him, and at length took him in execution; at which time no dividend had been declared. The bankrupt petitioned, that the Plaintiff might be ordered to release him from custody. When the petition came on upon the 8th of August, the Plaintiff refusing in Court to consent to discharge the petitioner, the Lord Chancellor was inclined to make an order for that purpose: but *Ex parte White, ante*, Vol. II. 9; 4 Bro. Ch. Ca. 114, being mentioned, and several gentlemen of the Bar expressing great doubt, whether the Lord Chancellor, sitting in bankruptcy, could stop the creditor at law, the petition was ordered to stand to Michaelmas Term.

Mr. *W. Agar*, for the petition. The bankrupt was discharged in *Ex parte James*, 1 P. Wms. 610, and *Anonymous*, 2 P. Wms. 394, upon his own petition. In those cases the creditor proceeding at law was not the petitioning creditor. The same order has been

made as against the petitioning creditor proceeding at law: *Ex parte Ward*, 1 Atk. 153. In *Ex parte D'Orvilliers*, 1 Atk. 221, the creditor was obliged to elect. There is no difference between the petitioning creditor and the other creditors coming in: 1 Bro. Ch.

Ca. 271. In all the cases, where a creditor has upon re-
 [*2] funding a dividend been permitted to proceed *at law, the action was commenced before the bankruptcy. The bankrupt was in employment, when he was arrested, and has been in prison four months. It is not the course to grant an injunction.

LORD CHANCELLOR [LOUGHBOROUGH]. It is a very oppressive case on the part of the creditor, and a case of great cruelty: but I am very much obliged to the Bar for interposing; for I am quite satisfied I have no authority to make the order. If I could have exercised a jurisdiction over the creditor, I should have been very glad to have done so. The case of the petitioning creditor is quite different: he submits himself to all orders the Court shall make. The cases, in which the creditor is permitted to refund, are vastly strong. I cannot bar this creditor of his legal remedy (1).

THE 59th section of the statute 6 Geo. IV. c. 16, enacts, that proof or claim under a commission of bankruptcy shall be deemed an election by the creditor to come in under the commission, with respect to the debt so proved by him. But it is one thing to say, that no person shall come in under a commission without relinquishing all proceedings at law in respect of every demand provable under that commission, and quite another thing to say, that a person who has proved one debt under a commission shall not subsequently bring an action in respect of a distinct demand. *Ex parte Glover*, 1 Glyn & Jameson, 270. See, *ante*, the note *Ex parte Hopkinson*, 1 V. 159.

(1) *Ex parte Hopkinson*, *ante*, vol. i. 159. Since that case the general rule was settled, that a creditor could not be compelled to elect before a dividend; subject to exception upon special grounds. See *post*, *Ex parte Sharpe*, vol. xi. 203; *Ex parte Grosvenor*, xiv. 587. By statute 49 Geo. III. c. 121, the creditor could not claim under the commission without relinquishing his action; and the proof or claim was an election. A similar provision is contained in stat. 6 Geo. IV. c. 16, s. 59. The claim for this purpose must be admitted upon the proceedings by the Commissioners: *Ex parte Friik*, 1 Glyn & Jam. 165. Before the statute a creditor, having signed the certificate, could not refund his dividend and proceed at law: *Ex parte Freeman*, *post*, vol. iv. 836.

MILDMAY, *Ex parte*.

[1795, Nov. 14.]

BANKRUPTCY of the committee of the person of a lunatic is a sufficient cause for removing him on account of the fund for maintenance: but the custody of the person will not be changed, if the Master finds it proper with regard to the comfort of the lunatic, that it should continue. (a)

IN August, 1784, a commission of lunacy issued against George Pescod, under which Richard Jeston Case and Cassandra, his wife, who was cousin-german to the lunatic, were appointed committees of the person. Upon the bankruptcy of Case this petition was presented by Jane Mildmay, one of the relations of the lunatic, praying, that Case and his wife might be discharged from being committees of the person of the lunatic, and that other committees might be appointed. The other relations of the lunatic consented to the petition for which the bankruptcy was the only ground. The committee by his affidavit represented, that he had every assurance, that his certificate would be allowed in a very short time; that he had taken the lease of a house at Chelsea, and furnished it for the accommodation of the lunatic; and that he scarcely ever interfered in the management of the person, but left it wholly to his wife. The affidavit also stated, that the lunatic was much restored from a most deplorable state by the treatment he had received, which was very affectionate and tender, and that a removal would be dangerous; in which particulars it was confirmed by the affidavits of the surgeon and apothecary, who had attended the lunatic.

Mr. *Armitage*, for the Committee. The Court looks to the comfort and *advantage of the lunatic; and in this instance all the circumstances connect his comfort and advantage with his present situation. At least there ought to be an inquiry whether a removal will be for his benefit. [*3]

LORD CHANCELLOR. It does not follow, that if another Committee is appointed, I shall change the care of the personal attendance of the lunatic: but they would have the administration of the money. If I order a sum of money for his maintenance, I cannot put that sum into the hands of a person, over whose administration of it I have no control. If another Committee is appointed, he will receive the allowance: but if the Master find it proper with regard to the comfort of the lunatic, that the custody of the person should remain where it now is, if you make out that case, I will not remove

(a) See, *ante*, notes to *Oxenden v. Compton*, 2 V. 69; 2 Barb. Ch. Pr. 235-244. According to the practice of New York, the committee must execute a bond with sureties, conditioned for the faithful performance of his trust. *Ib.* 237. The committee should have regard entirely to the care, comfort and health of the lunatic. *Ib.* Property held in trust does not pass to the assignees of the agent or trustee, in case of bankruptcy, or insolvency. *Dexter v. Stewart*, 7 Johns. 52.

that custody. Refer it to the Master to appoint another Committee (1).

THE doctrine laid down in this case was approved, as affording a good general rule, in *Ex parte Proctor*, 1 Swanst. 531; where, however, it was observed, that there might be instances in which it would not be practicable to secure the due application of a lunatic's allowance, after the committee of his person was become a bankrupt, without changing the custody. That the leading object in the administration of the jurisdiction in lunacy is the comfort and advantage of the lunatic himself, was recognized in the case just cited, as well as in numerous others, see, *ante*, the note to *Ex parte Chumley*, 1 V. 296.

WENTWORTH v. TURNER.

[1795, Nov. 19.]

TENANT for life having made a lease of coal-mines amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction.

Tenant for life, liable to waste, having sold timber, cannot prevent the vendee from cutting it.

TENANT for life made a lease of coal-mines to the Defendant.

Mr. King, on the part of the tenant for life and the remainder-man in fee, who joined in the bill, moved for an injunction to restrain the Defendant from taking coal; alledging, that the lease was made by mistake, and was a forfeiture of the estate for life.

LORD CHANCELLOR. I cannot help that. I cannot hear a man coming to disaffirm his own lease. If tenant for life liable to waste had sold timber, he could not prevent the vendee from cutting it. It is collusion to bring forward the remainder-man. If he complains, he must file a bill alone.

THERE are cases, no doubt, in which a tenant for life, without being joined by the remainder-man, may sustain an injunction against waste: *Davies v. Leo*, 6 Ves. 787: but those are cases in which the interest, or the satisfactory enjoyment, of the tenant for life has been, or is threatened to be, illegally encroached upon. It would be quite a different thing to allow him to complain of acts which he has himself, as far as in him lay, distinctly authorized. If those acts are prejudicial to the rights of the remainder-man, he unquestionably may be entitled to relief, provided he stands clear of all collusion with the tenant for life. See, *ante*, note 2, to *Lee v. Alston*, 1 V. 78, and notes 3, and 4, to *Pigott v. Bullock*, 1 V. 479.

(1) See *Ex parte Proctor*, 1 Swanst. 531.

LOKER v. ROLLE.

[1795, Nov 18, 20.]

BILL charging, that the Defendants had got the title-deeds, and mixed the boundaries, prayed a discovery, possession, and an account: demurrer allowed. (a)

ROBERT LARDER made his will, dated the 29th of December, 1758, as follows: "*Imprimis*, I make, constitute, declare, appoint, and ordain, Benjamin Loker my whole and sole executor, jointly with his wife Elizabeth, to whom I give all my goods and chattels and credits, be it of what kind or nature whatsoever or wheresoever, movable or immovable. I likewise devise after my decease my house that I have in Crewkerne with all the furniture in it; and I devise and bequeath all my lands for ever, except those that are settled in my marriage articles. I give and bequeath all my ready money to Benjamin Loker jointly with his wife." The testator then bequeathed arrears of rent, if any, to his executors as above; and any sums of money, bills, bonds, mortgages, &c. which should appear due at his death, he gave to them; and also a tenement in East Budley in the county of Devon to Benjamin Loker for ever, paying to Robert Larder 5*l.* per annum for his natural life; and he also gave another tenement to Benjamin Loker jointly with his wife.

The bill having stated this will, charged the following facts. The testator died soon after he had made his will, leaving Benjamin Loker and his wife, the Plaintiff's father and mother, surviving. Upon the death of the testator, the Defendants Bragge, Clark, Burt, and Churchill, got into possession and receipt of the rents and profits of the said freehold estates not comprised in the marriage articles mentioned in the will. Some time after the testator's death Benjamin Loker, the Plaintiff's father died. Afterwards, on or about the 6th of April, 1785, the Plaintiff's mother died, leaving the Plaintiff her eldest son and heir at law surviving; whereupon the Plaintiff as her heir at law became entitled to all the said real estates, of which the testator so died seized, save and except those comprised in the said marriage articles. The Plaintiff's father upon the death of the testator having got possession of all the title-deeds relative to the said estate, together with the said marriage articles, delivered the same to Baruch Fox, at that time employed as attorney or agent for the Defendants, who by mistake, or through some other motive advised the Plaintiff's father, that he took no estate or interest whatsoever in any of the testator's real estates under his will; in con-

(a) A bill for the possession of land, which is commonly called an Ejectment Bill, is demurrable; for the proper redress is at law. In the present case, although the plaintiff would be entitled to the discovery of the title deeds; yet he would not have any title to the relief, which, after the discovery, would properly be given at law; and by praying relief, as well as discovery, his whole bill is demurrable. See Story, Eq. Pl. § 476; 1 Story, Eq. Jur. § 71; Cooper, Eq. Pl. 125; Russell v. Clarke, 7 Cranch, 69, 89. See, also, Laight v. Morgan, 1 Johns. Ca. 429; Carter v. United Ins. Co. 1 Johns. Ch. 463; Kimberly v. Sells, 3 Johns. Ch. 467. See note (a) Renison v. Ashley, 2 V. 459.

sequence of which advice the Plaintiff's father and mother never took any steps to recover possession of the said estates. The Defendant Rolle, ever since the testator's death, has been and now is in possession and receipt of the rents and profits of one third part of two certain farms, with their respective appurtenances, called Buckham and Chelborough, and of one third part of Walditch Farm, and of a certain tenement in Bridport, late in the tenure of John Hoare, part of the testator's real estates not comprised in the said marriage articles; and the father of the Defendant Bragge at the testator's death got into possession and receipt of the rents and profits of one other third part of the said farms, called Chelborough and Walditch farms, and the said tenement in Bridport; and since his death the Defendant Bragge has been and is in possession; and he is the sole executor of his father. The Defendant Clarke is in possession of the farm, called Buckham, with the appurtenances, and so has been from a short time subsequent to the testator's death. The Defendant Burt is in possession and receipt of the rents and profits of the whole of a certain farm, called Lucas Farm, and one third part of the said farms, called Buckham, Chelborough, and Walditch, farms, and of the said tenement in Bridport; and the aforesaid several persons or some of them are also in possession of the lands and premises comprised in the said marriage articles: and they have blended and mixed both estates together, as well the settled as the unsettled estates, so that they the Defendants alone can now distinguish the same. The defendant Fox as administrator of his father possessed himself of all and every the title-deeds and writings belonging to the said testator's real estates, and also the said marriage articles, which had been so delivered to Baruch Fox his father. The bill farther charged, that the Defendants Clarke and Burt were not purchasers for valuable consideration without notice; that the Defendants had notice of the will; and that in case the said Defendants would produce the said marriage articles and also the said other title-deeds, it would appear, that the Plaintiff was entitled to all the said estates before mentioned to be in possession of the said Defendants respectively, or some part thereof, and which lie intermixed and blended with the premises comprised in the said marriage articles; and cannot be distinguished therefrom without the production and discovery of the title-deeds and marriage articles; and that without such deeds and marriage articles the Plaintiff is unable to proceed for the

[*6] recovery thereof; and it * would appear, that none or only some small part of the estates before mentioned are comprised in such marriage articles, and that withholding the deeds is fraudulent, and deprives him of the means of sufficiently ascertaining the lands belonging to him, so as to bring an ejectment. The bill therefore prayed a discovery; and that it might be ascertained under the decree, which of the aforesaid lands and hereditaments were so devised as aforesaid by the testator to the Plaintiff's father and mother, and were not included in the said marriage articles;

and that the Plaintiff might be declared entitled thereto, and to such of the deeds and writings as relate thereto, and that possession thereof respectively might be delivered up to the Plaintiff; and that the Defendants might account for the rents and profits, and that what should be coming due upon such account might be paid to the Plaintiff. The usual affidavit was annexed to the bill by the Plaintiff, that he had not the deeds and writings relating to the estates, and did not know where they were, unless they were in the custody of the Defendants or one of them.

The Defendants Rolle, Bragge, and Clarke, demurred generally.

Solicitor General [Sir John Mitford], and Mr. Short, for the demurrer. This is a fishing bill. The Plaintiff claims under a title, that according to his own statement commenced above forty years ago. There is nothing to prevent him from bringing an ejectment, if he is entitled, and not barred by length of time.

Attorney General [Sir John Scott], for the Plaintiff. The Plaintiff charges, that the boundaries are so intermixed and blended, that no ejectment can be brought. In order to that it is necessary, that the title-deeds should be produced; which are stated to be in the possession of the Defendants. The bill calls on the Court to ascertain the lands. It may do that either by a commission, or by directing an issue, or giving leave to bring an action. The single question is, Whether, where the bill asserts a power in the testator of disposing of some lands and not of others, and that the devisees upon his death took possession of all, and by the intermixture of the lands the title cannot be tried by ejectment, and the bill is therefore brought for a discovery, and for equitable relief in consequence of the impossibility of proceeding at law, the Defendant can demur? This case is certainly *distinguishable from a [*7] mere ejectment bill, where no obstruction lies in the way of proceeding at law.

LORD CHANCELLOR [LOUGHBOROUGH]. Upon the face of the bill it is quite clear, the Plaintiff may draw a declaration in ejectment (1). The bill states the title, and that by some means or other the same persons are in possession of all the lands, and have confounded the boundaries: the only consequence is, that the Plaintiff may come for a discovery to know, what are the farms, and who are in possession: but that never can entitle him to come for possession and an account. He avers, contrary to the fact disclosed by his bill, that he does not know the lands. He describes the two farms and the tenement. If he had filed a bill for discovery only, he must have paid for the discovery: but it goes on to pray relief, that is merely an ejectment. As to the form of the demurrer, I take it to be now a settled point, that though he may be entitled to a discovery, yet if he goes on to pray relief, to which he is not entitled, it is a good ground of demurrer, and the Defendant is not to be put to an-

(1) *Ante*, *Renison v. Ashley*, vol. ii. 459; *post*, *Lady Shaftesbury v. Arrowsmith*, vol. iv. 66; *Crow v. Tyrrell*, 3 Mad. 179.

swer (1). He may bring an ejectment for a farm, the name of which he knows, and a tenement, which he describes by the name of the last occupier. Allow the demurrer.

SEE the notes to *Renison v. Ashley*, 2 V. 459.

PUSHMAN v. FILLITER.

[ROLLS.—1795, DEC. 7.]

TESTATOR gave the residue of his personal estate to his wife, desiring her to provide for his daughter A. out of the same, as long as she, his wife, should live, and at her decease to dispose of what shall be left, among his children, in such manner as she shall judge most proper. There is not an absolute trust for the children after the death of the wife. (a)

JOHN PUSHMAN by his will gave a legacy of 50*l.* to his son, to be paid by his executors twelve months after his decease or day of marriage, which should first happen. Then he gave to his wife all his bankers and boat-hales, and also the use of his horses, cart-tackle, and boats, for and during the term of her natural life; and after her decease, he gave, devised, and bequeathed, the same unto his said son Henry, his heirs, executors, administrators, and assigns. The testator then disposed of the residue as follows: "Lastly, all my household goods and furniture, plate, linen and china, ready money and securities for money, stock in trade, together with the residue and remainder of my personal estate of every nature or kind soever or wheresoever, I give, devise, and bequeath unto my said wife Mary Pushman, desiring her to provide for my [*8] *daughter Anne out of the same, as long as she my said

(a) See, *ante*, note (a) to *Bull v. Vardy*, 1 V. 270; also 2 Story, Eq. Jur. 1068-1074, and cases cited, where the doctrine of trusts raised under a recommendation is clearly considered, and is pronounced not a little difficult to be maintained upon sound principles of interpretation of the actual intention of a testator. The current of decisions has been of late years against converting the legatee into a trustee. *Sale v. Moore*, 1 Sim. 534; *Meredith v. Hereage*, 1 Sim. 542. A strong case illustrative of the more recent doctrine is *Ex parte Payne*, 2 Y. & C. 636, where the testator devised his estate to his daughter, "as some reward for her affectionate, unwearied and unexampled attention to him during his illness of many years," and then added, "I strongly recommend to her to execute a settlement of the said estate and thereby to vest the same in trustees, &c. for the use and benefit of herself for life, with remainder to all and every the children she may happen to have, if more than one, the whole to such one; or to such other uses, as my said daughter shall think proper; to the intent, that the said estate, in the event of her marriage, shall be effectually protected and secured"; and Lord Chief Baron Abinger held, that the daughter took an absolute estate. But see *Ford v. Fowler*, 3 Beavan, 146; *Knight v. Knight*, 3 Beavan, 148; *Hart v. Hart*, 2 Dess. 83; *Van Dyck v. Van Beuren*, 1 Caines, 84; *Farwell v. Jacobs*, 4 Mass. 634; *Bolling v. Bolling*, 5 Munf. 334; *Sydnor v. Sydnor*, 2 Munf. 263.

wife shall live, and at her decease to dispose of what shall be left among my children in such manner, as she shall judge most proper."

The testator appointed his wife executrix. The bill was filed against Filliter, executor of Mary Pushman, by the children, who claimed under the residuary clause in the will of their father, as creating an absolute trust upon the death of their mother.

Mr. *Graham* and Mr. *Hall*, for the Plaintiffs. Moor, 57, pl. 162. *Hardinge v. Glynn*, 1 Atk. 469. *Nowlan v. Nolligan*, 1 Bro. Ch. Ca. 489. *Pierson v. Garnet*, 2 Bro. Ch. Ca. 38, 226. *Hands v. Hands*, cited 1 Term Rep. B. R. 437. *Malim v. Keighley*, ante, Vol. II. 333, 529 (1). There is a clear distinction between *Wynne v. Hawkins* (2), and this case: in that the testator meant to leave the whole to his wife. The words "what shall be left" in this will refer clearly to the provision for the daughter Anne, and mean after what might be necessary for the support of his wife and that daughter. The fund therefore is ascertained, nothing being taken out but what is necessary for that purpose. It is a gift to the wife for life; remainder to the children after her death; but with power to provide for one daughter during her life. In all the cases, in which the ulterior disposition has been disputed, it has been, where the first taker has had the ownership. There was no necessity for executing the power among the children: the testator would not have died intestate.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Without doubt. There is only one question: whether, if a bill had been filed in the wife's life, the Court would have compelled her to set apart a sufficient part for her daughter Anne, and have directed, that she should have the rest for life, and that it should go over at her decease. The only question is, whether she could spend any more than the interest of the property after having provided for her daughter. The words are clearly sufficient to raise a trust; for we are now got beyond any possibility of doubt as to the rule of the Court, that all words of recommendation or desire by a person having power to command shall operate as a trust. The only question then is, whether the person, in whose favor the request is made, and the property, to which it applies, are certain: *if so, all [*9] these words, used by a person having a right to command, shall create a trust. The Lord Chancellor in *Malim v. Keighley*, seems to think, the Lords Commissioners in *Cunliffe v. Cunliffe* (3) did not intend to break in upon the rule. I cannot but think still, that it is over-ruled by *Pierson v. Garnet*: but however his Lordship agreed with me; and it is now clearly settled upon *Wynne v. Hawkins*, *Pierson v. Garnet*, and the other cases, that any words or recommendation by a person having a right to command do create a trust, if the person and property are defined; and the only

(1) *Bull v. Vardy*, ante, vol. i. 270; and the note 272.

(2) 1 Bro. C. C. 179.

(3) Amb. 686.

question is, whether it is clear the testator intended, that his wife should have no power to dispose except for the maintenance of his daughter Anne, and meant to create a trust of all the rest. Therefore it is merely a question of construction upon the words "what shall be left;" whether they mean only what shall be left after providing for his daughter Anne. I think *Wynne v. Hawkins* as strong as this. It might have been equally contended in that case, that he meant all after she had expended what was necessary for her own income. In this it must be contended, that if a bill had been filed, the property would have been impounded, I am clearly of opinion, that I should go too far, if I did not hold, that he left it in the discretion of his wife to give to his children any part she might not dispose of. I construe the words larger than the Plaintiffs; that it is an absolute gift to his wife of any part of this property to any use she might think fit, clothed only with a trust for his daughter Anne, who, I admit, could have filed a bill: but no one else could.

Dismiss the bill without costs, so far as it prays an account of the personal estate of the father.

According to what the Lord Chancellor in *Malin v. Keighley* says of *Cunliffe v. Cunliffe*, if the mother could spend it, there is no trust; otherwise, if she could not: therefore *Cunliffe v. Cunliffe* is an authority for this decision. —

THAT words of recommendation in a will have, generally, the force of an imperative direction, and create a trust, see, *ante*, note 2, to *Bull v. Varty*, 1 V. 270, and note 4, to *Moggridge v. Thackwell*, 1 V. 464: and for the qualifications of that general doctrine, see note 2, to *Pigott v. Bullock*, 1 V. 479.

CRICKETT v. DOLBY.

[ROLLS.—1795, DEC. 7, 9.]

A LEGACY from an uncle to a niece, to be paid at twenty-one or marriage, does not carry interest before the time of payment. (a)

The Court will not supply a surrender for a natural child; but, if it has a legacy from the father payable at twenty-one, will allow maintenance, (b) [p. 11.]

Legacy to be paid at a particular time is *debitum in presenti solvendum in futuro* and vested, [p. 13.]

Legacy from a parent to a child bears interest before the time of payment, and from the death of the testator; and is the only instance, [p. 13.]

Legacy payable at twenty-one; before which time the legatee dies: if interest is payable, his executor shall have the legacy immediately: if not, he must wait till the legatee would have been twenty-one, and cannot then have the interest, [p. 13.]

Legacy payable at twenty-one; before which time the legatee dies: a person

(a) Where no time of payment is provided for by the terms of the will, a pecuniary legacy is payable at the end of the year after the testator's death, and not before. *Sullivan v. Winthrop*, 1 Sumner, 12; *Eyre v. Golding*, 5 Binney, 475; *Shobe v. Carr*, 3 Munf.; *Swearingham v. Stull*, 4 H. & M'Hen. 38; *Marsh v. Hague*, 1 Edw. 175; *Brooke v. Lewis*, 6 Mad. 358. As a corollary from this rule it has been as constantly held, that interest is not payable upon any pecuniary legacy (unless provided for by the will) until after the year is elapsed; or, if the will fixes a period for payment, until that period is elapsed; for interest cannot be claimed except for a demand actually due, and from the time it becomes due. 2 Roper Leg. by White, ch. 15, p. 172; ch. 20, p. 184; *Davis v. Swan*, 4 Mass. 208; *Birdall v. Hendlett*, 1 Paige, 32. There are exceptions, however, to the general rule. One is, when a legacy is given by a parent, to an infant child, who is otherwise unprovided for; for then, upon the presumed intention of the parent to fulfil his moral obligation to maintain his child, interest will be allowed from the death of the testator as a maintenance for the child, where no other fund is applicable for such maintenance. And this is equally true, whether a future time is fixed for the payment of the legacy, or no time is fixed for it by the will. But if other funds are provided for the maintenance of the child, then interest is only allowable as in other cases. The same doctrine, which applies to parents, is also applied to testators placing themselves *in loco parentis*; but the exception is not allowed in favor of a legatee standing in the relation of a wife, or natural child, or grand-child, or niece, as such, any more than in favor of a stranger, unless there can be further engrafted upon it a parental relation assumed by the testator. *Sullivan v. Winthrop*, 1 Sumner, 14, and English cases cited, which will be found in Hovenden's note at the end of the case; *Lupton v. Lupton*, 2 Johns. Ch. 614.

Where the testator became bound to the parish for the support of an illegitimate child of his son, and he made weekly payments until his death; it was held that he had placed himself *in loco parentis*, and that interest was payable from the testator's death on a legacy given by him to the child, though made payable on attaining twenty-one. *Rogers v. Scutten*, 2 Keen, 598. See, also, on the subject of interest on legacies, *Ingraham v. Postell*, 1 M'Cord, Ch. 98; *Codgell v. Codgell*, 3 Deasaus. 367; *Ingraham v. Powell*, 1 M'Cord, Ch. 94; *Gillon v. Turnbull*, Id. 148; *Bitzer v. Hahn*, 14 Serg. & R. 238; *Van Bramer v. Hoffman*, 2 Johns. Ch. 200; *Miles v. Wester*, 5 Binn. 477; *Glen v. Fisher*, 6 Johns. ch. 33; *Knight v. Knight*, 2 Sim. & Stu. 490; *Quarles v. Quarles*, 2 Munf. 321; 2 Williams, Executors, 1020-1029; *Stephenson v. Axson*, 1 Bai. Eq. 274; *Smith v. Field*, 6 Dana, 364. But there is nothing to prevent executors from paying legacies, if they choose, within the year after the death of the testator. *Angerstein v. Martin*, Turn. & Russ. 241.

(b) Where a legacy is given to a natural child, with directions to apply the interest for his maintenance, the interest is payable from the death of the testator. *Douling v. Tyrell*, 2 Russ. & M. 343.

claiming by limitation over takes immediately: but the administrator of the infant must wait till the time, at which the legacy is payable, unless the whole interest is given, (c) [p. 16.]

A wife as well as a child within the exception to the rule, that a legacy does not bear interest, till it is payable. (See n. 12,) [p. 17.]

Legacy from parent to child payable *in futuro*: if maintenance is given generally, it shall carry interest: but if an annual sum less than the interest is given for maintenance, the executor paying that shall have the rest, [p. 17.]

THIS case arose upon the following clause in a will: "I give and bequeath to my two nieces Sarah Alexander Crickett and Susan Alexander Crickett, daughters of my sister Sarah Alexander Crickett, the sum of 500*l.* a piece, of lawful money of Great Britain, to be paid to them respectively at their respective ages of one and twenty years or day or days of marriage, which shall first happen." The testator appointed his brother executor and residuary legatee.

Sarah Alexander Crickett having attained the age of twenty-one years, filed the bill for an account of the personal estate of the testator; and the question was, whether the Plaintiff and her sister were entitled to interest upon their legacies, before they attained the age of twenty-one years.

Mr. *Graham* and Mr. *Stanley*, for the Plaintiff and her sister, the legatees. This point has never been determined. Where a legacy is given immediately, payable at a future day, the principle is, that it is *debitum in presenti solvendum in futuro*. It is a debt from the time it is given; and being a debt, it is as a severance of so much of the property; and then from the time it actually vested, that with the produce is the property of the party; and though they cannot except in the case of parent and child insist upon receiving the interest, before the principal is due, yet at the day of payment they may insist upon the produce. In 1 Ch. Ca. 60, infant legatees called upon the executor for maintenance, suggesting that they had none: the executor demurred, because the legacies were not payable till twenty-one; and the demurrer was over-ruled. I admit, the modern cases allow it only in the case of a provision by a parent for a child. *Nicholls v. Osborn*, P. Wms. 420. The only distinction between that case and this is, that was the case of a residue: but that makes no difference. In *Palmer v. Mason*, 1 Atk. 505, and *Heath v. Perry*, 3 Atk. 101, Lord Hardwicke proceeds entirely upon the ground of the legacy being vested or not. There are several authorities that whenever a legacy is clearly vested, though

[* 11] to be devested by a subsequent event, the party shall have interest without express words, and that it is not confined to the case of a parent giving a provision to a child. *Acherly v. Vernon*, 1 P. Wms. 783; *Bourne v. Tynte*, cited there. *Chaworth v. Hooper*, *Hawkins v. Combe*, 1 Bro. Ch. Ca. 82, 335. There are many cases, in which provisions of this sort may be considered as

(c) 2 Williams, Exec. 1001. But if a legacy be payable out of *land* at a future day, although given with interest in the mean time, if the legatee die before the day of payment, the Court will not direct the legacy to be raised until the time for payment arrives. *Gawler v. Standwick*, 2 Cox, 15.

portions. This is a legacy by an uncle, absolute, not given over, and appears severed from the bulk of the estate, the residue being disposed of. In *Churchill v. Speake*, 1 Vern. 251, it carried interest, though there had been no demand.

Mr. *Lloyd* and Mr. *Alexander*, for the executor and residuary legatee. *Palmer v. Mason* was over-ruled in *Green v. Pigot*, 1 Bro. Ch. Ca. 105. There have been many decrees for securing the fund; and the interest in the mean time has been given to the residuary legatee. Every decree says, that the Master shall compute interest from a year after the testator's death, unless any particular rate of interest or time of payment is pointed out by the will, and then according to the will. *Acherly v. Vernon* and the other cases depend upon particular circumstances. In *Acherly v. Vernon* Lord Macclesfield thought, that being given to trustees it was taken out of the bulk of the estate. This is simply a legacy by a stranger. The distinction between that and the case of parent and child constitutes the whole difference. The parent is bound to maintain the child: but if even a grandfather gives a legacy to a grandchild, and no particular time is mentioned, it shall carry interest from one year after the testator's death, because it then becomes due: but if it is payable at a particular period, there is no delay of payment, and therefore there can be no interest. It is so laid down in *Haughton v. Harrison*, 2 Atk. 329. The case of a residue does not apply. In *Roden v. Smith*, Amb. 588, it is laid down, that if a legacy is given to an infant, to be paid at twenty-one, and if he dies under that age, then over, the legatee over shall have it immediately, if the first legatee dies under age: but if the legacy is not given over, and the first legatee dies under age, the administrator must wait till the infant would have attained twenty-one, because the residuary legatee is entitled to the interest in the mean time. The same thing was determined in *Laundy v. Williams*, 2 P. Wms. 478, and recognized in *May v. Wood*, 3 Bro. Ch. Ca. 474. In *Descramps v. Tompkins*, 4 Bro. Ch. Ca. 150 n. no interest was allowed.

Reply. In *Haughton v. Harrison* the legacy was not *vested: there was a condition precedent; and what fell [*12] from Lord Hardwicke is only a *dictum* upon a point not then in question. In all the cases there is a labored effort to find out, whether it is a vested interest or not. *Roden v. Smith* proceeded upon this, that where a legacy is given, and a specific sum, not the interest of the legacy, is directed to be paid, the testator has marked distinctly, that he did not mean the whole interest to go. The expression cited from the decrees means, unless some prior time is mentioned in the will.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I thought this point had been decided; and I should never have thought of raising a difficulty, if I had found it upon the will, or if I had been Counsel. I should *currente calamo* have held, that the legacy could not have borne interest. I am sure the principle has been acted upon; for I know, I had the case of a grandchild before me; and

by struggling in favor of the grandchild I forced the executor to allow interest. The Court has departed from all principle in making the distinction. A grandchild is always in the same case as a child; but I cannot go so far as the case of an uncle. Another case is that of a natural child, for whom the Court will not supply a surrender (1): but if the father by will gives his natural child a portion payable at twenty-one, the Court will not say, it was intended to starve in the mean time, but will allow maintenance. If the Plaintiff is right, that question never could have arisen. I will look into the cases: but I entertain no doubt.

Dec. 9th. MASTER OF THE ROLLS. When this was first opened, I had much doubt whether I ought to permit it to be argued; having considered it to be as settled a point as any this Court has ever acted upon; but when it was stated to be that sort of case, which, though it might have been thrown out in judgment, yet never had been *res judicata*, I was willing to hear what could be urged, and principally with a view to decide as to the costs; for I certainly had no doubt, that upon looking into the cases it would appear, that though perhaps the very point had not been made the subject of decision, which might arise from its having never been questioned, cases have been determined over and over again, in which this case has been taken for granted; and they could have no doubt, if this had not been determined.

[*13] *I apprehend the testator had no children of his own, though it does not appear, nor what the fund is. No maintenance nor interest is given; and the single question is, whether a legacy to be paid at a particular time, which by the rule of the Court is held to be *debitum in presenti solvendum in futuro* (2), and consequently a vested interest, is to carry interest from a year after the testator's death exactly as if it was not limited in point of time. What is stated as the language of every decree is decisive. As to the answer, that the expression "unless some other time of payment, &c." must mean some prior time, why has not the decree then got that? But the form never has been so, but universally as stated for the executor. Upon this plain principle, that interest is to be given

(1) Nor for a grand-child: *Kettle v. Townsend*, 1 Salk. 187; *post*, *Perry v. Whitehead*, vol. vi. 544; and in 546, Lord Eldon distinguishes the case of a grand-child, as not entitled to interest merely as a legatee; as a child is. The cases, *Greenwell v. Greenwell*, *post*, vol. v. 194; *Collis v. Blackburn*, ix. 470; and *Fairman v. Green*, x. 45; have been much disapproved by Lord Eldon; who would not follow them in any case admitting distinction; *post*, *Lomax v. Lomax*, *Ex parte Kebble*, vol. xi. 48, 604; *Errat v. Barlow*, xiv. 202, and the references in the note, 203; 2 Swanst. 436, and the note: as, where the whole interest is not confined absolutely to the legatees or the survivor; but there is a limitation over to the issue of any dying under twenty-one, or to a stranger. As to interest upon a legacy to a natural child, see 1 Sch. & Lef. 6, 7, the note. *Post*, vol. iv. 647; vi. 547; *Lovndes v. Lovndes*, xv. 301, against interest from the death of the testator; unless by implication appearing *in loco parentis*, intending a provision and maintenance: *Hill v. Hill*, 3 Ves. & Bea. 183. The relation of natural child not acknowledged by the law: *Cartwright v. Vaudry*, *post*, vol. v. 530, and the note, page 534.

(2) *Post*, *Mackell v. Winter*, 536; *Bolger v. Mackell*, vol. v. 509.

only for default of payment, no interest can commence, unless where payment is delayed. It is impossible to contend, that the executor is bound to pay before he is ordered by the testator, unless under some very particular circumstances, which I will state. The rule is, that no interest is to be paid, till the time arrives, at which payment is ordered, except in one case only, that of a child (1), but upon quite a different ground. In that instance the Court does not postpone the payment of interest till a year after the death of the parent; for the Court considers the parent to be under an obligation to provide not only a future but a present maintenance for his child, and therefore holds, that he could have postponed the time of payment only from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy; which fruit is the only maintenance, and which maintenance he was bound to provide. But what occasion is there for all this contention in favor of the child, if every one is entitled? Another case is, where a legacy is ordered to be paid at the age of twenty-one years, and the legatee dies before the time: shall the executor wait, till the legatee would have been twenty-one, or have it immediately? It depends upon the question, whether interest was payable or not; if it was, the executor shall have it immediately: otherwise he must wait. It is admitted for the Plaintiff, that if this legatee had died, her executor could not have the legacy, till the legatee would, if she had lived; have attained the age of twenty-one. There never could have been such an absurdity as the notion, that you must wait till that time, and then have the subject with the interest.

I believe it is truly stated, that this identical point has not *been one, that the Court has determined upon. I have [*14] looked into all the cases; and I believe the Counsel are right in that. The first case upon the subject is, that cited from 1 Ch. Ca. 60: which is a very old one; in the time of Charles the Second, determined by Justice Archer in the time of Lord Clarendon, and long before the rules, upon which the Court has since acted, were settled. The executor demurred. It did not appear, whether the legatees were children or not. The Report says, "The Defendant demurred; for that the Plaintiffs were under age, and their legacies were not to be paid till twenty-one, and so had no cause of suit." Now according to the present course of the Court there was a cause of suit to impound it. I do not know who the Reporter was: but there is this note added by the Reporter; "No doubt equity may interpose and order the payment as they see fit; besides the legacy is *debitum in presenti* though *solvendum in futuro*; and as it shall go to his executors in case of his death, *a fortiori*, it shall be paid to him to support his life." This is a very inaccurate case. The legatees had a clear right to have their legacies secured. That

(1) *Post, Mitchell v. Bower*, 283; *Tyrell v. Tyrell*, vol. iv. 1; *Chambers v. Goldwin*, *Lomax v. Lomax*, xi. 1, 48; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Raven v. Waite*, *Pett v. Fellones*, 1 Swanst. 553, 561, n.

seems the only case in point; and see, whether it has been followed in any one instance. The rule, that has prevailed, is laid down so early as in an anonymous case, 2 Vern. 199, a book of no great accuracy, which however states what I must admit to be the rule of the Court at this time: but he refers to two cases, from which I do not think it can be extracted; *Clobberie's Case*, 2 Vent. 342, and *Sanders v. Earle*, 2 Rep. Ch. 98. I must admit, the principle of those two cases does not decide the point, for which they are referred to. The latter was a gift to a daughter, and goes a great way to show, that the administrator of the child, who died, was to wait till the time, at which that child would have received the legacy. I cannot admit the reasoning, that the administrator is to wait merely to receive it with interest. The case in *Ventris* is very shortly reported. Perhaps these cases do not mean to decide exactly this case: but the inference from the reason and principles of them is the two rules laid down, and which have been uniformly, I believe, acted upon since that time.

With regard to the other cases, the only one, that has in any degree weighed with me as at all intrenching upon this, is [* 15] *Acherly v. Vernon*. *That case must be admitted to have afforded some ground of argument for what is now contended; and Lord Macclesfield did find himself under some difficulty to reconcile that case with the principles, which I suppose he must have admitted at the time. If it was a general rule, what occasion was there for him to endeavor to raise special circumstances? whereas he did reason upon the particular circumstances, and thought, that upon them he was bound to give interest up to that time, when the legacy would be paid. Whether he was right or wrong in applying the special circumstances, I do not say: but certainly he did not think it a general rule.

Then see what Lord Hardwicke says in *Heath v. Perry*, and *Hearl v. Greenbank*, 3 Atk. 716. 1 Ves. 307; and it is very material to see that case in both the Reporters; for both concur in Lord Hardwicke's language. He lays down this rule as clearly established; that a legacy payable at a certain time does not carry interest till that time; and he states, that *Acherly v. Vernon* was founded singly and solely upon the particular circumstances; and Lord Hardwicke was very cautious in laying down a rule, unless it was a clear rule. In *Heath v. Perry*, and *Hearl v. Greenbank* both the Reporters concur in making him lay down this rule over and over in such terms, that it is impossible for them not to have understood him; and he reasons from that. I cannot therefore suppose that both these Reporters mistook him. What has been done since? I never heard it doubted before. It has been acted upon in various cases, but is not reported. Look at the case of *Laundy v. Williams*, and those subjoined in Mr. Cox's note. See what is there supposed to be the rule in this case. Apply that to what is there determined; and see, whether it has not been clearly and uniformly acted upon, though perhaps it has not been made a point, upon which the Court

has made a decision. In *Roden v. Smith* a legacy of 500*l.* was given to a grandchild, payable at twenty-one, with an allowance of 1*l.* a year for maintenance till four years old, and 16*l.* a year afterwards till twenty-one. Upon the death of the grand-child under twenty-one the question occurred, whether the administrator should be paid the money immediately, and so be entitled to the interest from the death of the infant, or wait till such time as the infant would have attained twenty-one. *I cannot be- [*16] lieve, that at that time he is to receive it with interest. A distinction is taken in that case between a person claiming the legacy by a limitation over and the administrator of the infant; and it is laid down, that the former takes immediately on the death of the infant, but the latter must wait till the time, at which the legacy is payable, unless the whole interest is given in the mean time. This was followed by *Green v. Pigot* (1), in which the very same doctrine is recognized by Lord Thurlow. I never had any doubt upon it. I have looked into all the cases. None of them contradict this except that one in the time of Charles II. Therefore I hope this will be considered as a settled point, upon which executors may not be put to the expense of defending, unless at the peril of costs. The rule is clear, that a legacy payable at any given time whatsoever does not carry interest till that time, whether it is a vested interest or not: the time of payment must govern the commencement of interest, with this difference only, that a legacy given by a parent to a child shall carry interest from the death of the testator on account of the obligation attaching upon the person, who gives it, and because it is in nature of a portion; therefore interest in the mean time is added, though it is not given in express terms; and *Acherly v. Vernon* was determined upon the idea, that the testator put himself in *loco parentis*. All the other cases upon the point, whether the administrator of the legatee is entitled to the legacy immediately or must wait till the period, at which the legatee would have been entitled to it, depend upon this.

I am loth to encourage suits: but as this is a family cause, I am not inclined to give costs, though I consider this as a very clear point. The Plaintiff might have taken the legacy and have come for the interest only. It does not appear what the property is. Declare the legatees entitled to their legacies with interest to be computed only from the time of their attaining the age of twenty-one respectively. Let the bill, so far as it seeks interest prior to that time, be dismissed: but as it is alleged to be a family suit only to take the opinion of the Court, the same solicitor being employed for all parties, I will give costs.

I think a wife would certainly come under the same exception as a child (2). *I do not find it in the books. [*17]

(1) Bro. C. C. 103.

(2) This dictum over-ruled, *post*, *Stent v. Robinson*, vol. xii. 461; *Loumdes v. Loumdes*, xv. 301; *Raven v. Waite*, 1 Swanst, 553. [It has been decided in New

It can hardly ever happen, that a wife has not some other provision; and that may make a difference in the case of a child. If maintenance is given generally to the child, so that the whole may be exhausted by the maintenance, that shows the testator meant it to carry interest: but if a partial maintenance is given, as if an annual sum less than the interest is given for maintenance, the child shall have no more; and the executor paying that sum shall have all the rest.

1. INTEREST, unless expressly given from an earlier date, is allowed, even in respect of an immediate legacy, only from the end of the year after the testator's death; before which time, if no other period is assigned by the will, payment of the legacy cannot be demanded: *Gibson v. Bott*, 7 Ves. 96: and interest on a legacy, unless there is a special provision made for it, is allowed for delay of payment only: *Hearle v. Greenbank*, 3 Atk. 716: therefore, when a legacy is given, to be paid at any particular time, it will not carry interest before that time. *Anonymous*, 2 Freem. 207. Where, indeed, the legacy is not a general pecuniary one, but a specific bequest of a *corpus*, that is an immediate gift, passing both the fund and its produce, from the death of the testator. *Raven v. Waite*, 1 Swanst. 557; *Kirby v. Potter*, 4 Ves. 751; *Barrington v. Tristram*, 6 Ves. 349. And, when a legacy is given to the infant child of the testator, interest may be payable immediately, if there is no other fund applicable for the proper maintenance of such child: *Lowndes v. Lowndes*, 15 Ves. 304; *Cary v. Askew*, 1 Cox, 244; *Harvey v. Harvey*, 2 P. Wms. 22: but, where other means of support are provided for the child, there, if the legacy be payable at a future day, it will not carry interest until the day of payment comes, more than in the case of a legacy to a perfect stranger: *Wynch v. Wynch*, 1 Cox, 435; *Ellis v. Ellis*, 1 Sch. & Lef. 5; *Heath v. Perry*, 3 Atk. 102; *Hearle v. Greenbank*, 3 Atk. 718: and though the executor may be required to secure the fund, he cannot be called upon for interest before the day mentioned for payment of the principal. *Tyrrell v. Tyrrell*, 4 Ves. 5.

2. The general rule as to non-payment of interest upon a legacy, before such legacy becomes due, must not be broken in upon by an exception in favor of an adult legatee, however nearly related to the testator; *Raven v. Waite*, 1 Swanst. 558; and, as illegitimate children are, in legal contemplation, no more than strangers, (*Lowndes v. Lowndes*, 15 Ves. 304,) it seems, notwithstanding what was intimated *obiter* in the principal case, that interest cannot be allowed, by way of maintenance, in favor of such legatees: *Perry v. Whitehead*, 6 Ves. 547; unless it can be collected, from the will, that the testator intended to give interest. *Beckford v. Tobin*, 1 Ves. Sen. 310; *Ellis v. Ellis*, 1 Sch. & Lef. 6; *Raven v. Waite*, *ubi supra*. Even in the case of a grand-child an executor must not take upon himself to pay interest upon a legacy by way of maintenance, when it is not expressly provided by the will; for, though it was said, in the principal case, that Courts of Equity should struggle in favor of the grand-child, yet, it seems, there must be something more than the mere gift of a legacy, something indicating that the testator put himself in *loco parentis* to justify a Court in decreeing interest for a grand-child's maintenance. *Perry v. Whitehead*, 6 Ves. 547; *Rawlins v. Goldtrap*, 5 Ves. 443; *Hill v. Hill*, 3 Ves. & Bea. 186. But, of course, even when a legacy to a grand-child is not payable till he comes of age, still maintenance may be allowed for his support during his infancy, provided the parties to whom the legacy is given over, in case of the infant's death, are competent and willing to consent: *Cavendish v. Mercer*, 5 Ves. 195 (in note): this may also be done where the fund is given among the children of a family, who, being infants, cannot consent, but who have all an equal chance of survivorship, and an equal interest in having maintenance allowed: *Greenwell v. Greenwell*, 5 Ves. 199;

York that a legacy to the widow in lieu of dower, draws interest from the death of the testator, where he has provided no other means for her support during the first year after his death. *Williamson v. Williamson*, 6 Paige, 298.]

Collis v. Blackburn, 9 Ves. 471; *Errington v. Chapman*, 12 V. 25; *Fairman v. Green*, 10 Ves. 48: nor will it be any objection, that other children may possibly come in *esse* after the order made. *Errat v. Barlow*, 14 Ves. 204; *Haley v. Bannister*, 4 Mad. 280. But, if the will contain *successive limitations* over, to parties between whom this privy does not exist, and under which limitations persons not in being may become entitled, it is not sufficient that all the parties then living, and presumptively entitled, are before the Court; for none of the living may be parties eventually entitled to the property. *Marshall v. Holloway*, 2 Swanst. 436; *Ex parte Kebble*, 11 Ves. 606; *Errington v. Chapman*, *ubi supra*; *Lomax v. Lomax*, 11 Ves. 48.

3. Notwithstanding the opinion thrown out by Lord Alvanley in the principal case, it seems to be now settled, that no exception is to be made, in favor of the testator's wife, to the general rule, that a legacy does not bear interest before it is payable. *Lowndes v. Lowndes*, 15 Ves. 304; *Stent v. Robinson*, 12 Ves. 461; *Raven v. Waite*, 1 Swanst. 559.

4. The observation as to the rule of not supplying a surrender in favor of a natural child, is no longer important. The statute 55 Geo. III. c. 192, renders every disposition of copyhold estates by will effectual, (supposing the will to be good in other respects,) without the necessity of a previous surrender to the uses of the testator's will.

5. Where a bequest is made to a legatee at his age of twenty-one, or any other specified age, or, if he attain such age, this is such a description of the person who is to take, that, if the legatee do not sustain the character at that time, the legacy will fail; the time when it is to be paid is attached to the legacy itself; and the condition precedent prevents the legacy from vesting. *Parsons v. Parsons*, 5 Ves. 582; *Sansbury v. Reed*, 12 Ves. 78; *Errington v. Chapman*, 12 Ves. 24. But if the legacy be to an infant, payable at twenty-one, the legacy is held to be vested; the description is satisfied, and the other part of the direction refers to the payment only. The distinction is borrowed from the civil law, but is adopted as to personal legacies only, not as to real estate; and is spoken of as a rule neither to be extended nor approved. *Dawson v. Killett*, 1 Brown, 123; *Mackell v. Winter*, 3 Ves. 543; *Bolger v. Mackell*, 5 Ves. 509; *Hanson v. Graham*, 6 Ves. 245. The case of *Meredith v. Tooke*, decided by Lord Hardwicke, in Hil. T. 19 Geo. II. (10th Feb. 1745,) appears from Mr. Forrester's *ms.* to have been as follows. Mary Lethieullier by will devised in these words, "I do hereby order my executrixes hereinafter named to lay out the sum of 2,400*l.* in the purchase of government securities within one month after my decease in their own names, and that they do pay the interest or dividends thereof to my grand-son William Lethieullier during the term of his natural life, and from and after his decease then I will and direct my executrixes to deliver and transfer the said securities which shall be so purchased with the said sum of 2,400*l.* to the children of my said grand-son William Lethieullier to be divided amongst them share and share alike as they shall respectively attain his or their age of 21 years if sons, or if daughters at their ages of 21 years, or marriage, or if there shall be but one child of my grand-son, then I give the whole security to such one child at his or her age of 21, or marriage. And I direct that the dividends or interest of the said 2,400*l.* shall, from the death of my said grand-son, be from time to time, as soon as it amounts to 100*l.* laid out in the purchase of good government securities, all which I direct shall be also delivered to the child or children of my said grand-son, in the like manner as the securities to be purchased with the said sum of 2,400*l.* are hereby directed to be, and in case of the death of any of the said children before the age or marriage before mentioned, I will that their respective shares shall go to the survivor of them." The testatrix died in the life of her grand-son William, who died leaving issue one son John. John died when about five years old, and his mother, the plaintiff in the suit, took out administration to him. The question was, whether the said bequest of the 2,400*l.* vested in John, and his mother, consequently, as his administratrix, was entitled to it, or whether it was a lapsed legacy by his dying under age. Lord Hardwicke said, "I shall premise that the whole clause on which this question depends, consists of a direction to the executrixes. The common distinction has been made, that where a legacy is given at 21, it is not vested; but if given absolute, to be paid at 21, it is vested. I shall first consider the latter part of the clause, where the testatrix puts the

case of an only child, not merely because it is that which has happened, but because it may afford some light in explanation of the other part of the clause; now, in the latter part the gift is to such one child *at his or her age of 21*; here, therefore, the time is plainly annexed to the gift itself. But it is insisted on by the plaintiff, and I think rightly, that the case will not necessarily be dependent on this passage of the will singly, but that if there be words in the general disposition which show the intent of the testatrix that this legacy should vest in any case, or in that of there being several children, those words shall control the strictness of the latter, even in the case which has happened of there being only one child. As to this, however, the whole, as I said before, consists of a direction to the executrices, and therefore the argument used for the plaintiff, that this is a severance of the 2,400*l.* from the rest of the estate of the testatrix, fails; for this is not like a bequest to trustees, but the property during the life of William Lethieullier continued in the executrices. It was farther insisted for the plaintiff, that the gift to the children of William was immediate; that the direction to deliver and transfer is absolute and immediate, and the division only is to be postponed till 21. But I am of opinion that the reference of the words *as they shall attain their age of 21 years* must go to the delivery and transfer, as well as to the division. It appears to be so from the nature of the thing itself, for, how were these securities to have been delivered and transferred to these children before they were divided? to all the children jointly?—no, certainly. The testatrix has directed an accumulation of the interest till the children attained 21; such interest to be received and laid out in the mean time by the executrices, which is inconsistent with a transfer before that time. The new securities to be purchased with the dividends are directed to be transferred in like manner as the securities to be purchased with the 2,400*l.* These words in *like manner* must relate to the time, for there is no other mode or circumstance to which they can refer. Now, *these* securities could not be transferred till the children were 21, because the fund out of which they were to arise was not to close till then; and the whole being to go in like manner, the securities purchased with the principal sum of 2,400*l.* must not be transferred till the same time. In the latter part of the clause the testatrix has given the legacy expressly at 21; but in the former part of the clause her meaning is expressed to be the same, and I think it plainly appears to have been her intent that the whole should be suspended till some of the children attained 21. As to her intent what should become of this legacy in the case that has happened, it in no way appears; but there is not the least probability that it was her intent to give it to the child's administratrix. The cases cited from 2 Vern. 508, and 673, do not come up to this, for in both of them *interest* was to commence *immediately*; and as to that of *Acherley v. Vernon*, 1 P. Wms. 783, the question there was only about the commencement of the interest, and the legacy was severed from the bulk of the estate, and could not go to the residuary legatee, from the terms of the will. Upon the whole therefore, the bill, as to this demand, must be dismissed." It appears that the report of *Cave v. Cave*, referred to by Lord Hardwicke as from 2 Vern. 508, would have been no sound authority for the plaintiff, even had it been more closely in point in his favor; for the inaccuracy of that report has been ascertained by an examination of the Register: see *Boycott v. Cotton*, 1 Atk. 556.

6. Where a legacy though a vested one, is not payable till a certain fixed period, before which the legatee dies, his executor or administrator must wait till the appointed period, unless interest was given for the intermediate time; otherwise the personal representatives of the original testator would be deprived of a benefit apparently intended for them; but where, indeed, they are to be accountable for interest, the same reason does not exist, and the legacy may be claimed forthwith, if the delay of payment was only directed with reference to the minority of the legatee: *Cloberry v. Lampen*, 2 Freem. 25; *Anonymous*, *ibid.* 64; *Anonymous*, 2 Vern. 199; *Green v. Pigot*, 1 Brown, 105; *Fonnereau v. Fonnereau*, 1 Ves. Sen. 119: but giving a small yearly sum, by way of maintenance, is not equivalent to giving interest, for the purpose last adverted to. *Chester v. Painter*, 2 P. Wms. 336; *Hanson v. Graham*, 6 Ves. 249.

LAKE v. THOMAS

[1795, Dec. 16.]

BILL against the devisee of mortgaged premises by the heir of mortgagor for discovery and redemption, charging acknowledgments, that the estate was held in mortgage, and that accounts had been kept: plea of possession for fifty years under conveyances from the mortgagee ordered to stand for an answer. (a)
 A mortgaged estate getting into different hands, redemption was refused as to part from length of time; and opened as to the other part, accounts having been kept, and there being a devise of it as a mortgage, [p. 22.]

THE bill stated the following case. The Plaintiff William Lake is the eldest son and heir at law of William Lake deceased, who was the eldest son and heir at law of William Lake deceased. William Lake the Plaintiff's grandfather being seised and possessed or otherwise entitled to a certain estate, called Trugwall, borrowed 120*l.* of Robert Nicholls; and for securing the re-payment thereof with interest executed some indenture or indentures of mortgage of the said premises for some long term, or otherwise conveyed the said premises in mortgage to the said Nicholls, who assigned his interest in the mortgaged premises to John Thomas, who by his will gave all his interest in the said premises and the money due thereon to his son, the Defendant Henry Thomas, who by virtue of such will or otherwise became possessed of and entitled to the said mortgage security. John Thomas during his life got into possession of the premises, and received the rents and profits till his death. Henry Thomas, the Defendant, having become entitled as aforesaid, entered upon the said premises, and has been ever since and still is in possession. William Lake, the Plaintiff's grandfather, died some years since intestate, leaving William Lake, the Plaintiff's father, his eldest son and heir; who died in or about the year 1781, leaving the Plaintiff his eldest son and heir at law then an infant of tender years, and who has only lately attained his age of twenty-one years. The Plaintiff's father in the year 1789 applied for a redemption; but being a sea-faring man was prevented from prosecuting his said claim at that time; and the Plaintiff being an infant, and in
 Holland at the death of his father, where he continued until [18]
 the 11th of August, 1792, the said mortgagees were suffered to hold and continue in possession and enjoyment of the said mortgaged premises, and to receive the rents and profits. The Plaintiff upon the death of his father became entitled to the equity of redemption. The rents and profits received by the Defendant and his father have been much more than sufficient to keep down the interest. The Defendant refuses a redemption, alleging, that he can make it appear, by deeds and writings in his custody, that the premises are not liable to be redeemed, but which he refuses to produce.

The bill charged, that the premises were not sold, but only mort-

(a) See, *ante*, note (b) to *Edsell v. Buchanan*, 2 V. 83; also notes to *Jones v. Twiberville*, 2 V. 11, 12.

gaged to Nicholls, and assigned by way of mortgage to Thomas; which would appear, if the Defendant would produce the said conveyances and other deeds and writings relating to the said premises and mortgage now in his custody or power; that the said John Thomas always considered the said premises as in mortgage only to him; and some time ago before his death acknowledged, that the said premises were held by mortgage only, and declared, he should be well satisfied with payment of the said principal mortgage money so advanced upon the same as aforesaid and the interest due thereon, or to that effect; that the Defendant in the year 1769, wrote a letter in the name and by the desire or direction of the said John Thomas or with his privity or consent, and sent the same to the Plaintiff's father, whereby the said Thomas declared his readiness to accept the principal and interest due upon the said mortgage, viz.

" *Reverend Sir,*

" I did not receive your favor of the 26th of May until Sunday
 " last, so could not answer you 'ere now; and in answer thereto I
 " some time since showed the debt upon Tridgwell mortgages to
 " William Lake and to parson Walsars also: the first said, he thought
 " it was the full value of it, and that I was welcome to it; and the
 " latter, that he would wash his hands of it; their very express
 " answers. This is some years past, and with the growing interest,
 " &c. it is advanced so high as about 400*l.*, and Mrs. Jordan alive
 " and well, and am informed a better life than she was some time
 " past, and may live twenty years for age. If you or Wil-
 [* 19] " liam Lake have a farther mind to * talk about it, when
 " you come into the country, shall be glad to see you and
 " him also. The quantity of acres are about ten; and my father
 " took it in a public survey at 10*l.* per annum during Mrs. Jordan's
 " life; which is supposed always the full value of every estate so
 " taken. I am for my father John Thomas your most humble
 " servant,
 " HENRY THOMAS."

Which letter the Plaintiff is ready to produce. The bill farther charged, that the Defendant had lately since the death of John Thomas acknowledged, that the said premises were in mortgage, and that he held the same as mortgagee only, or to that effect; also, that the Defendant had kept some accounts of his receipts or payments on account of the said premises under an idea that he might be called upon in respect thereof; and had always or at some time considered himself as mortgagee only of such premises. The bill prayed a discovery, and that the Plaintiff might be at liberty to redeem, and that the Defendant might be decreed to account for the rents and profits received by his father or himself or by their order or for their use; and that an account might be taken of the principal and interest due upon the mortgage; and that upon the Plaintiff's paying what should appear due the Defendant should be decreed to re-convey, and that possession should be delivered to the Plaintiff, together with all the title-deeds, &c.

As to the redemption and discovery, and the account of the rents and profits received by John Thomas or by the Defendant or by their order or for their use from the estates in the bill mentioned, and as to so much of the bill, as sought to have possession of the said estates or of the title-deeds and writings relative to the same, the Defendant pleaded in bar, that in 1731 the said William Lake being seised or otherwise well entitled to the messuage or tenement after mentioned, subject to a rent-charge of 10*l.* per annum, to Elizabeth Lake, borrowed 60*l.* of John Hearle and William Pearce; for securing which he by indenture, dated the 27th of January, 1731, demised to them, their executors, administrators and assigns, all those messuages, lands, tenements and hereditaments, called Trugwall (describing them) to hold for 1000 years subject to redemption; and in 1741 the said William Lake being so seised or entitled, subject as aforesaid, borrowed of Thomas Roskruge 90*l.*; for securing which he by indenture, dated *the 28th and [* 20] 29th of August, 1741, conveyed the Trugwall estate to Roskruge, to hold to him and his heirs for ever subject to redemption; that these mortgages became absolute; and Roskruge in 1742 conveyed to Robert Nicholls, his heirs and assigns for ever, all the said premises, to hold to him, his heirs and assigns, subject to the mortgage; and by indenture of the 12th November, 1742, Hearle reciting, that he was entitled by surviving Pearce, assigned to Robert Nicholls, to hold to him, his executors, administrators and assigns, for the remainder of the term of 1000 years; that by indentures, dated the 6th and 7th of October, 1746, Nicholls conveyed and assigned the mortgage in fee, and the remainder of the term for years subject to the said mortgage, to John Thomas, who in 1746 got into possession of the said premises and so continued quietly to his death upon the 15th of May, 1770; and by his will, dated the 10th of May, 1769, he devised and bequeathed to his son Henry Thomas all the rest of his goods, effects and chattels, either in fee, lease, mortgages, reversions or expectancy, with all his stock in trade, cash, book-debts, bills, bonds, notes, dues and demands, whatsoever, first paying all his just and lawful debts, to him and his heirs forever; and appointed him sole executor; and after the death of John Thomas, the Defendant by virtue of his will and as his eldest son and heir at law entered upon the said premises, and received the rents, and peaceably enjoyed the same till the filing of the bill; and he insisted upon the length of possession and quiet enjoyment.

Mr. *Alexander*, for the plea. Great convenience will arise from supporting this plea, if possible. The possession, upon which the defence is founded, is fifty years. As to the mode of defence, in *Aggas v. Pickerell*, 3 Atk. 244, though Lord Hardwicke doubted at first, and ordered precedents to be searched, he ultimately determined, that a plea was proper. An objection will be made upon the charges, that the father of the Defendant always considered the premises as in mortgage only, and declared, he should be satisfied

with principal and interest, and the Defendant himself lately acknowledged, that the premises were in mortgage, and he held as mortgagee only. I doubt, whether any thing by parol only is sufficient. It must be a solemn, distinct and deliberate, promise; as was held by the Master of the Rolls in a case before him in 1792. In that case the Master of the Rolls said (1), there [*21] * was an exception to the rule, if the mortgagee treated it as a mortgage; as by stating accounts, &c. He states the case to be, where a deliberate solemn act in writing took place, and said, *Perry v. Marston*, 2 Bro. Ch. Ca. 397 (2), was the only case of parol evidence; and there the decree of the Master of the Rolls was reversed by Lord Thurlow. He said, he would not lay it down, that no parol evidence should be admitted; because the case before him did not call for it; but if evidence is to be admitted, it ought to be clear, and to show a deliberate intention to permit redemption; and he dismissed the bill without costs. The charges amount to nothing more than that the title was a mortgage title; which the plea admits. It states only acknowledgments to that effect a great while ago, not that he declared it upon an application to be redeemed. There is no appearance of a deliberate intention or wish to be redeemed. The letter contradicts the claim; showing rather a treaty for the sale of an irredeemable interest than a redemption. It never was proceeded in, and must be considered as abandoned. As to the infancy, it is not stated, that William Lake the father was an infant at the death of the grandfather; consequently the bar had attached long before the death of the father in 1781; and the descent upon his infant son could not revive it.

LORD CHANCELLOR [LOUGHBOROUGH]. There is a charge in the bill, that the Defendant had kept an account.

For the Plea. That is no ground for a redemption. There is no such case as to a private account.

LORD CHANCELLOR. I do not know, how far any one fact in the bill might weigh: but there are a good many circumstances stated in this bill, some combination of which has certainly led the Court to keep the redemption open. Whether the objection, that nothing except in writing will do, I would not judge without farther consideration (3). That case at the Rolls was not upon a plea.

Attorney General [Sir John Scott], for the Plaintiff. The plea to the discovery cannot be good.

LORD CHANCELLOR. I think the plea goes too far; for it requires me to decide a material point without any farther information [*22] * than the suggestions of the bill. I had some notion, the Courts had gone in some cases upon this idea, that if the parties had treated it and dealt with it as a mortgage, and kept accounts upon it as a mortgage, there would be no harm in considering it so.

(1) *Whiting v. White*, Coop. 1.

(2) The depositions are stated from the Reg. Book, Coop. 165.

(3) *Reeks v. Postlethwaite*, Coop. 161; *Barron v. Martin*, Coop. 189; *post*, vol. xix. 327.

For the Plaintiff. If he devised it as a mortgage.

LORD CHANCELLOR. There was a very long case, I think before Sir Thomas Clark, about redemption. The title of the estate had come into two different hands: the part in the hands of one family was held irredeemable: as to the other, the mortgagee had kept accounts, and I think, there was a devise of it as a mortgage: and the redemption was opened as to that after a vast number of years.

I think it must stand for an answer. Save the benefit of the plea to the hearing.

SEE notes 2, and 3, to *Edsell v. Buchanan*, 2 V. 83.

SHAW v. WRIGHT.

[1795, DEC. 17. 1796, APRIL 28; JULY 21.]

BILL for an account taken *pro confesso* against surviving executor and devisee in trust, and leasehold estates taken under a sequestration for want of an answer: the Court would not order the sequestrators to sell; but directed them to apply the profits. (a)

The Court also ordered the dividends of money in the bank on the testator's account to be paid under the will, but could not order the bank to transfer before the act 36 Geo. III. c. 90, [p. 23.]

Appointment of a receiver in the place of the sequestrators discharges the sequestration, (b) [p. 23.]

The Court will sell perishable commodities, rents paid in kind, or the natural produce of a farm, under a sequestration, [p. 23.]

THE bill was filed against the surviving executor and devisee in trust under the will of — Beaumont to have the trusts of the will carried into execution. A sequestration issued for want of an answer; under which some leasehold houses were taken. The bill

(a) The process of sequestration is a writ or commission issuing out of, and under the seal of the Court, directed to the sheriff, or, which is most usual, to certain persons of the complainant's own nomination, empowering him or them to enter upon and sequester the real and personal estate of the defendant, (or some particular part of his lands,) and to take, receive, and sequester, the rents, issues and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the Court shall, in its discretion, appoint, until the defendant shall have appeared to, or answered the complainant's bill (or performed some other matter which has been ordered and enjoined by the Court, in the process specifically mentioned), and for not doing whereof he is in contempt. 1 Barb. Ch. Pr. 68; Hinde, 127. Roger North in his entertaining life of his brother, Lord Keeper Guildford, says that "sequestrations were not heard of till Lord Coventry's time, when Sir John Read lay in the Fleet, (with 10,000*l.* in an iron chest in his chamber,) for disobedience of a decree, and would not submit to pay the duty. This being represented to the Lord Keeper as a great contempt and affront upon the Court, he authorized men to go and break up his iron chest, and pay the duty and costs, and leave the rest to him, and discharge his commitment." "From thence," continues North, "came sequestrations, which now are so established as to run of course, after all other process fails, and is but in the nature of a grand distress, the best process at common law, and after a summons, such as a *subpoena* is." North's Life of Guildford, vol. ii. 73; see also 2 Maddock, Ch. 205. Under a sequestration upon *mesne process*, the sequestrators may take possession of all the defendant's goods and chattels, which are in the possession of the defendant, or which can be reached without suit, or action: for *choses in action* cannot be sequestered. 1 Barb. Ch. Pr. 70, 71; 1 Daniell, 637. Where the sequestration is for the non-performance of a decree, the Court will, on proper application, give them authority to let the property: *Neale v. Neale*, 3 Swanst. 304, note; but no such authority will be given where the sequestration is upon *mesne process*. *Ray v. —*, 3 Swanst. 306, note. As to the powers and duties of sequestrators, their accounts, the attornment of tenants to them, the sale of goods by them, see 1 Barb. Ch. Pr. 71, 72. As to what are the regular proceedings whereon to ground sequestration, and where it is proper, see *Hook v. Rose*, 1 H. & Munf. 310; *Ross v. Colville*, 3 Call, 382; Anonymous, 1 Hayw. 347; *Anderson v. —*, 2 Hayw. 22.

The deposit by sequestration belongs to the law of Bailments, and not to the present subject. See Story, Bailments, § 45; *La Forge v. Morgan*, 11 Martin, 462, 522.

(b) *Heyn v. Heyn*, Jac. 49; 1 Barb. Ch. Pr. 75.

being taken *pro confesso*, the accounts were directed; and by the report it appeared, that the Defendant had sold out stock, and had received various sums of principal and interest, on account of the testator's estate, to the amount of 2675*l.*; with which sum the Master charged him. Upon farther directions and by petition the Plaintiffs prayed, that the sequestrators might be ordered to sell the houses, and account for what they had received; and that the rents and profits in their hands and the produce of the sale might after paying the expenses be applied to make up the deficiency due from the estate of the Defendant to that of the testator; and that the Bank might be ordered to transfer the sum of 1266*l.*, standing in their books on the testator's *account according to [* 23] the trusts of the will; namely, one moiety upon the trusts of the marriage settlement of the Plaintiffs Shaw and his wife; the other to the account of the other Plaintiff, who was an infant.

Mr. *Anstruther*, for the Plaintiffs. *Maynard v. Pomfret*, 3 Atk. 468, is an authority for the sale; and Lord Hardwicke refused to discharge the sequestration, and kept it alive to compel the Defendant to perform the decree; the bill being taken *pro confesso*. *Wilcox v. Wilcox*, Amb. 421, is nearer this.

LORD CHANCELLOR [LOUGHBOROUGH]. The order would do you no good. I should not have much difficulty in selling, not only perishable commodities, but if the sequestrators were in possession of rents paid in kind, or the natural produce of a farm (1); but how shall I make a title? By whom? I cannot well order the sequestrators to sell without at the same time warranting the title; then I do not know how I can do that. It does not transfer the term to the sequestrators. It is only a process to compel an appearance, the performance of a duty. All profits I will direct them to apply. The difficulty is this: if the sequestrators sell, and the purchasers should be brought before this Court to complete their contracts, I could not compel them to pay the money. I cannot make a man take a title, which he is to support a bill for an injunction. You will not find any instance of an order to sell under a sequestration a subject, which passes by title and not by delivery. That case before Lord Hardwicke goes the whole length of proving, that though the sequestration issued as mesne process to compel an answer, which is the sequestration here, yet it shall remain, if there is any duty to be performed. That was going a good way.

As to ordering the Bank to transfer, it puzzled me to consider, in what form it could be done. The case, where I have interfered, has been, where there has been somebody, but not a sufficient number. Here there is nobody. It would be worth while to give the Court such a jurisdiction, as in the case of infant trustees, that the Bank should transfer, as the Court should order them, where executors or trustees are abroad or obstinate. That would be

(1) In *Hales v. Shaftoe* (*ante*, vol. i. 86), the Master of the Rolls doubted, whether there can be any sale of goods taken under a sequestration upon mesne process, farther than to pay the expenses. See the note in p. 87.

a great accommodation. I have no difficulty in ordering the dividends to be paid into Court and distributed. The words of the act being negative create the difficulty. Let the Accountant General receive the dividends, and, when received, pay them in equal moieties according to the prayer of the Plaintiffs.

The rents were ordered to be paid into Court.

The *Solicitor General* [Sir John Mitford] cited the order in *Maynard v. Pomfret* from the Register's Book; stating the filing of the bill, and that for want of an answer a commission of sequestration of the personal estate and the rents and profits of the real estate of the Defendant issued. The bill was for want of an answer taken *pro confesso*; and an account was decreed. It was stated, that the expense of keeping possession would exhaust all the effects; and it was prayed, that a receiver of the rents and profits of the Defendant's freehold and leasehold estates might be appointed, and that the sequestrators might dispose of the personal effects seized, and pay the amount into the Bank. The Defendant submitted to pay the costs of the contempt; and prayed, that upon payment of those costs the sequestration might be discharged, and the effects delivered up. It was referred to the Master to appoint a receiver of the freehold and leasehold estates in question; and it was ordered, that the tenants should attorn and pay their rents to such receiver; and the Defendant having signified his consent to a sale of the household goods and other effects, it was ordered by consent; the Court determining, that they would retain possession.

1796, April 28th. Mr. *Anstruther*, upon the ground of the great expense of keeping up the sequestration, moved that the minutes of the order made on farther directions might be varied by inserting a direction, that a receiver should be appointed in the place of the sequestrators.

LORD CHANCELLOR [LOUGHBOROUGH]. I am afraid that will discharge the sequestration; and you will lose your process. It was upon that difficulty, that I did not order a receiver.

[* 25] * In consequence of what fell from the Lord Chancellor in this cause an act of Parliament, 36 Geo. III. c. 90, was passed; by which it was enacted, that when trustees of stock or the personal representatives (1) of such persons deceased shall be absent out of the jurisdiction, or not amenable to the process of the Courts of Chancery and Exchequer, or bankrupts, or lunatics (2), or shall refuse to transfer the stock, or to receive and pay over the dividends to the persons beneficially entitled, or it shall be uncertain or unknown whether they are living or dead, it shall be lawful for the said Courts respectively in any cause depending (3) to order, that

(1) *Lee v. The Bank of England*, post, vol. viii. 44.

(2) A lunatic abroad under a judicial proceeding in the nature of a commission of lunacy is not within the act. The act is limited to stock standing in the name of the lunatic, or his committee. *Ex parte Adams*, 2 Mer. 112.

(3) The provisions of this statute, and 52 Geo. III. c. 158, are, by stat. 57 Geo. III. c. 39, extended to petitions in matters of Charity and Benefit or Friendly societies. See an order in the Matter of a Friendly Society, 1 Sim. & Stu. 82.

the Accountant General, or the Secretary, or Deputy Secretary for the time being, of the Governor and Company of the Bank of England do transfer the said stock into the name of the Accountant General of the Court of Chancery or of the Deputy Remembrancer of the Court of Exchequer in trust in such cause, or otherwise into the names of the persons equitably or beneficially entitled, as the case may require, and as to the said Courts shall seem fit; and also to order, that the said Accountant General, Secretary, or Deputy Secretary, of the Governor and Company of the Bank of England do pay over the dividends of such stock, as the said Courts shall direct. It was also enacted, that where one or more, but not all, the trustees come under any of the descriptions above mentioned, the said Court may direct those, who are forthcoming, to transfer the stock and receive and pay over the dividends, as the said Courts shall direct.

1796, July 21st. The cause coming on for farther directions and upon petition, it was ordered, that the Deputy Secretary of the Bank should transfer to the Accountant General according to the prayer (1).

1. SEQUESTRATORS cannot, upon their own authority, apply the rents and profits of a sequestered estate, for the benefit of the plaintiff in the suit, when the sequestration is only on *mesne* process: see, *ante*, the note to *Hales v. Shaftoe*, 1 V. 86.

2. As to the title which a vendee may require, before a Court of Equity will compel him to complete his purchase, see the notes to *Cooper v. Denne*, 1 V. 565.

COLMAN v. THE DUKE OF ST. ALBANS.

[1796, FEB. 10.]

MORTGAGEE cannot have an account of rents and profits received by the mortgagor; though the security, being upon an estate for lives, is become insufficient. (a)

Qu. Whether the office of Register of the Court of Chancery is assignable. [p. 32.]

THE bill stated the following case:—King George the first by letters patent, dated the 11th of February in the 13th year of his reign, granted to Charles, Duke of St. Albans, George Cholmondeley, af-

(1) *Post*, *Simms v. Naylor*, vol. iv. 360; *Rider v. Kidder*, xiii. 123; *Williams v. Bird*, 1 Ves. & Bea. 3; *Burr v. Mason*, 2 Sim. & Stu. 11.

(a) The mortgagee may at any time enter and take possession of the land, by ejectment or writ of entry, though he cannot make the mortgagor account for the past, or by-gone rents, for he possessed in his own right and not in the character of receiver. 4 Kent, Comm. 164, (5th ed.); *Wilder v. Haughton*, 1 Pick. 90. He may without suit obtain possession of the rents and profits from a lessee under a lease existing prior to the mortgage, on giving him notice of his mortgage, and requiring the rent to be paid him, and in default he may distrain. *Ibid.* and cases cited. *Sanders v. Van Sickle*, 3 Halsted, 313; *M'Kircher v. Hawley*, 16 Johns. 269. See also, *Jones v. Clark*, 20 Johns. 51; *Magill v. Hinsdale*, 6 Comm. 464; *Pope v. Biggs*, 9 B. & C. 245. The mortgagee not in possession is not entitled

terwards Earl Cholmondeley, and Lord James Beauclerk, the office of Register of the High Court of Chancery, to hold and [* 26] enjoy the said office to them, to be *exercised by themselves respectively or their sufficient deputy or deputies, for the natural lives of the grantees and the survivor respectively; but in trust only for the Duke of St. Albans, his heirs and assigns, with all fees, wages, profits, and emoluments, to the said office belonging. Charles, Duke of St. Albans, borrowed of William Day the sum of 2500*l.* upon his bond, dated the 8th of October, 1728; and for farther security, the Duke executed an indenture of mortgage of the same date; and thereby in consideration of the said sum granted and assigned to William Day, his executors, administrators, and assigns, one full moiety of all manner of fees, wages, and other matters, incident to the said office of Register, as fully and amply as the said grantees or any of them might or could have, take, or receive, the same, and all the estate, profits, advantages, and emoluments, of the said Duke, in, to, or out of, the said moiety and premises thereby assigned, by virtue of the said letters patent or otherwise howsoever, to hold to the said William Day, his executors, administrators, and assigns, as his and their own moneys and estates and to his and their own use for the term of 99 years, if the said grantees or any of them should so long live, subject to redemption on payment of principal and interest by the Duke, his heirs, executors, and administrators; and the Duke thereby covenanted for payment of principal and interest.

By another indenture, dated the 11th of November, 1734, in consideration of 2500*l.* paid to William Day and of 3500*l.* paid to the Duke of St. Albans by the Archbishop of York, William Day and the Duke assigned to the Archbishop the moiety, so assigned to Day, for the residue of the term of 99 years, determinable as aforesaid; and the Duke granted and assigned to the Archbishop, his executors, administrators, and assigns, the other moiety of all fees, wages, and emoluments, by the said letters patent granted in trust for the Duke, to hold to the Archbishop, his executors, administrators, and assigns, from thenceforth for the same term, if the said grantees or any of them should so long live, subject to redemption on payment by the Duke, his heirs, executors, or administrators, to the Archbishop, his executors, administrators, and assigns, of 6000*l.* and interest at a time therein mentioned and long since past; and the Duke covenanted, that, if before the said 6000*l.* and interest should

[* 27] be wholly discharged, *any of the grantees should die, he would procure a new grant of the said office and premises for the lives of the survivors and some other person, to the end that there might be three lives in being during the continuance of the security, and would immediately after such new grant should be made grant and assign the office fees and premises in such new grant

to the emblements. *Toby v. Reed*, 9 Conn. 216. As between mortgagor and mortgagee, the property in timber cut and being on the premises is in the mortgagee subject to an account. This is the rule in *Massachusetts* and *Maine*. *Gove v. Jenness*, 19 *Maine*, 53.

to be comprised unto the Archbishop, his executors, administrators, and assigns, for 99 years, determinable on the deaths of the *cestuys que vie* in such new grant to be named and the longest liver of them, subject to redemption; and the Duke covenanted for himself, his heirs, executors, and administrators, with the Archbishop, his executors, administrators, and assigns, for payment of the said 6000*l.* and interest; and executed a bond of the same date for payment of the same.

By indenture, dated the 22d of August, 1739, the Archbishop of York, in consideration of 6000*l.* assigned to Sir Charles Wager all his interest in the said principal money and securities subject to such equity of redemption as the same were liable to; and Sir Charles Wager declared, that the said 6000*l.* was not paid by him; but that the said fees, advantages, emoluments, and other matters, and the said principal money, interest, and securities, were assigned to him in trust to pay the interest to the Archbishop for life, and after his death in trust for Dorothy Crewys, her executors, administrators, and assigns. By deed poll, dated the 12th of May, 1743, reciting the death of the Archbishop, Sir Charles Wager assigned the said 6000*l.* and securities to Dorothy Crewys, her executors and administrators.

By indentures, dated the 23d of _____, 1743, reciting, that the Duke had paid off 3000*l.* of the said sum and all interest due thereon, the Duke in consideration of another sum of 3000*l.* to him paid by Dorothy Crewys covenanted, that the said fees, emoluments, and other matters in the said letters patent mentioned, then vested in Dorothy Crewys, should be held by her, her executors, administrators and assigns, as well for securing the said sum then advanced as the 3000*l.* remaining due upon the said securities; and the Duke covenanted with Dorothy Crewys, her executors, administrators, and assigns, for payment of the said additional sum.

Dorothy Crewys died many years ago, having by her [* 28] will, dated the 22d of August, 1757, appointed her sister Bridget Crewys her executrix; who as such became entitled to the said 6000*l.* and interest. Charles Duke of St. Albans died in 1750, leaving George Duke of St. Albans his heir at law: who entered upon the said office and received the fees and emoluments thereof. Earl Cholmondeley soon afterwards died; and Lord James Beauclerk did at the request of the Duke, and with the consent of Bridget Crewys upon consideration, that such new security should be made to her, as is after mentioned, surrender the said grant to his Majesty; who by letters patent dated the 30th of May, in the 11th year of his reign, granted to George Duke of St. Albans, Charles Beauclerk, and Aubrey Beauclerk the present Duke, the aforesaid office and the fees and emoluments thereof by the same description as in the former letters patent; to hold for the term of their natural lives and the natural life of the survivor in trust for the Duke, his heirs and assigns.

By indenture dated the 2d of June, 1771, reciting the several matters before stated, and that Bridget Crewys consented to the sur-

render of the former grants upon the terms aforesaid; in order therefore to secure the re-payment of the said 6000*l.* and interest, and in pursuance of Duke Charles's covenant in the indenture of the 11th of November, 1734, for making a new security of the said premises upon a new grant of the said office to be obtained by him, his heirs or assigns, and in consideration of 5*s.*, the Duke of St. Albans granted and assigned to Bridget Crewys, her executors, administrators, and assigns, all and all manner of wages, fees, profits, rewards, advantages, emoluments, commodities, and liberties to the said office belonging, as fully and amply as they the said grantees or any of them had or might enjoy the same; to hold to the said Bridget, her executors, administrators, and assigns, as her and their own proper moneys and estate and to her and their own use for 99 years, if the said grantees or any of them should so long live; and the Duke authorized, appointed, and directed the Deputy Registers then and for the time being and all others concerned or deputed in registering or taking any fees or profits in respect of the said office during the said term to pay and satisfy all and every such fees and all such moneys, as should be due and payable from them in respect of the said office to Bridget Crewys, her executors, administrators, and assigns, for her own use; subject * to redemption on payment by the Duke, his heirs, executors, or administrators of 6000*l.* and interest.

The Duke continued in possession of the office and receipt of the fees and emoluments till his death in 1786; upon which Aubrey, the present Duke, as heir at law took possession of the office, and has been in receipt of the fees and emoluments ever since (1). Charles Beauclerk, one of the lives in the last grant, is dead. Bridget Crewys died, leaving the Plaintiffs her executors. They are also the personal representatives of Dorothy Crewys.

The bill charged, that as there was no other life in the last patent surviving except the Duke, the office itself was become an insufficient security for the said 6000*l.* and interest, and the Defendant ought to account to the Plaintiffs for the fees and emoluments thereof received by him hitherto and for any future fees and emoluments to be received by him in respect thereof; and that the Plaintiffs ought to be let into possession of the said office and the fees and emoluments thereof; but the Defendant refuses to consent thereto and to discover, how and to whom and for what purpose the fees and perquisites of the office have been from time to time applied and are applicable; and the plaintiffs insist, that a receiver ought to be appointed. The bill therefore prayed, that the Defendant might answer, and that an account might be taken of what was due for principal and interest to the Plaintiffs; and that the Defendant might pay the same or be foreclosed; and that a value might be set upon the office, or that the office might be sold; and in case the value to be

(1) The first Duke was succeeded by the second Duke George, who died in 1787; and upon his death Duke Aubrey took possession as heir. He was not heir at law. See *Drummond v. The Duke of St. Albans*, *post*, vol. v. 433.

set upon the office or the money to be produced by the sale should not be sufficient to pay what should appear to be due, that the Defendant might account for the fees and emoluments received by him or his order or for his use, and pay the same to the Plaintiffs, until they should be satisfied their principal, interest and costs.

The Defendant demurred to so much of the bill, as seeks a discovery, how and in what manner and for what purpose the fees, emoluments, and perquisites, of the office stated in the bill have been from time to time, while the Defendant was in possession of the office prior to the Plaintiff's instituting the suit, applied and applicable, and that the Defendant might account for the fees, emoluments, and perquisites, received by him or his order or for his *use during such period, while Defendant was in [*30] possession of the office anterior to the Plaintiff's instituting the suit, and pay what shall appear to have been so received in respect of the said fees, emoluments, and perquisites, of the office during such period anterior to the Plaintiff's instituting the said suit.

By his answer he stated, that he possessed the office as heir at law; submitting, whether it was assignable, being an office of trust, and confidence

Attorney General [Sir John Scott], for the demurrer. This is a mortgage with a right in the mortgagee to call on the persons, who are to pay the fees of this office, to pay them to her; and with a covenant on the part of the late Duke to pay the money; to which his assets are liable, and therefore perhaps the produce of these fees; though not specifically as fees. The demurrer submits, that the Plaintiff is in no other situation than any other mortgagee; and that a mortgagee is not to account for by-gone rents and profits.

Solicitor General [Sir John Mitford], and Mr. Richards, for the Plaintiffs. This is different from a common mortgage: but in the case of a common mortgage it would be impossible to maintain such a demurrer, supposing the means of obtaining the profits to be by resort to a Court of Equity; for the Defendant not being himself the mortgagor, no action would lie against him. If this was a real estate, as from the time of the demise in the ejectment the mesne profits might be recovered against the Defendant as a trespasser; so for the previous time from the moment that the actual tenant had notice, they may be recovered in an action for use and occupation: *Birch v. Wright*, 1 Term Rep. B. R. 378. But this is very different from the common case; and the Plaintiff is entitled to these profits upon equitable grounds. The only personal covenants for payment of the money were entered into by Duke Charles. In 1771, when the security was given upon the office under the new patent, no covenant was entered into by Duke George: but the debt was charged upon the office, which he took from Duke Charles; the Deputy Registers being directed to pay the profits to Mrs. Crewys. There is therefore no personal covenant except against the assets of Duke Charles. It is an assignment of the profits, creating a trust to hand them over; and the assignee has no resource

but a Court of Equity. The question then is, whether against an assignee for valuable consideration of the actual profits only (for she has no power over the office itself) the present Duke can [* 31] * retain them and refuse to hand them over, in case the value of the office is insufficient for her debt. A decision, that he can, will affect the credit of mortgages of estates for lives. *Treackle v. Cooke*, 1 Vern. 165, applies strongly; in which an assignee of a lease was charged in Equity for the rent during the time he received the profits upon the ground of an implied engagement to pay the rent. If this had been a legal assignment of the office, there is no doubt, the Plaintiffs might have brought an action of money had and received; to which nothing but the statute of Limitations could have been pleaded. These fees and emoluments went to the present Duke as heir or devisee clothed with this right of Mrs. Crewys; therefore there is a complete lien. At all events the Court will not determine this on demurrer.

Reply. The covenant of Duke Charles will bind all his assets. Mrs. Crewys makes her option not to abide by her old security; but concurs in the surrender of the old patent and in the new grant to Duke George; with whom she barter for a new security. She will not trust any legal remedies or to the appointment of a receiver in consequence of any equitable estate; but insists on having an express authority to call on the Deputy Registers to pay the profits to her. I will now suppose this grant legal for this purpose. The Duke says in answer to the bill, what is the language of every mortgagor to every mortgagee, that it was her voluntary act for twenty-six years to permit him to put into his pocket, as a fund to spend, the produce of this office; which she might have prevented by calling on the deputies. It is said, they are to have by-gone rents and profits, because they charge, that the security is insufficient. That would apply to leasehold estates, or estates for lives just worn out, or in fee, where there was a supervening charge the parties were not aware of at the time. A man, who lends on securities wearing out, knowing the security he takes, has only to enter, if he has reserved a legal right, or stipulate, as Mrs. Crewys did, for a direction to pay the rents and profits to him; and if he does not use those remedies, he must blame himself. As to an action for mesne profits, if such an action would lie, this Court would interfere. The faith between mortgagor and mortgagee is, that if the mortgagor keeps down the interest, the mortgagee not calling for his [* 32] principal has no right to call for the by-gone rents * and profits. In *Higgins v. The York Buildings Company*, 2 Atk. 107, and *Mead v. Lord Orrery*, 3 Atk. 244, Lord Hardwicke says, that in no instance, where the mortgagor is left in possession, is he liable to account to the mortgagee for the rents and profits. In ordinary mortgages the principle of equity is, that the Court does not sit to help men, who will not help themselves; and that it is against conscience, if they will not make use of their power, but induce the mortgagor to spend the rents and profits he received only

by their permission, that they should make him refund in equity. The claim of bond creditors for a distribution of assets is very different; for the moment the estate descends, the party knows, that he is liable to the debts. Whose fault is it, that there is no action against the present Duke? Mrs. Crewys might have refused to surrender her former security, unless he gave the means of a personal action or even larger remedies.

LORD CHANCELLOR [LOUGHBOROUGH]. There is no part of the bill, upon which the Plaintiffs can rely here, but that relating to the security taken from Duke George; for as to this point the security from Duke Charles is out of the question; for under that Mrs. Crewys had no right to enter and take the profits. His security gave only an assignment of the profits. He was in possession of the office, and was to continue in possession. All she could have done would have been to have brought an action against him receiving them. But the latter security gives the profits with an express power to her, as attorney of Duke George, to receive the whole from the Registers. She permitting them to be paid to the duke, it would be against all rules of Equity in the cases of mortgages to decree an account for the time, when by the connivance, or to speak more properly, the permission, of the mortgagee, the profits have been received, and applied, as the party might think fit. If a person takes a mortgage title, this Court will let him take possession of the estate; but will not make the party he leaves in possession account for the past rents. If he has not the legal title to the mortgaged property at law, this Court will appoint a receiver: but can it do more than appoint a receiver in the common case? In this case the mortgagee not using that power specifically given to fix upon the Deputy Registers the direct payment to her as assignee, must impute it to herself, if these profits are gone, and the security is perishable, or *there is any hazard attending it; as no [*33] doubt there is attending the security, she has taken. She has not used the remedy, she has taken.

I should wish to know, before this cause comes to a final conclusion, whether there could have been a direct legal assignment of the office. Is this an office assignable at law? An assignment of all the profits is very little different (1). Allow the demurrer (2).

THOUGH a mortgagor in possession is frequently said to be tenant at will to the mortgagee, he is so only *quodam modo*; Lord Mansfield observed, he is *like* a tenant at will; but nothing (his Lordship added) is more apt to confound than a *simile*. A tenant at will is bound to pay rent; rent, as such, can never be demanded from a mortgagor. *Moss v. Gallimore*, 1 Dougl. 283. The truth is, the relation of mortgagor and mortgagee is perfectly anomalous and *sui generis*. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 183. Their peculiar rights, powers, and interests, are well settled; but, though a mortgagor has had ascribed to him

(1) See *Hartwell v. Hartwell*, *post*, vol. iv. 811.

(2) In *Drummond v. The Duke of St. Albans*, *post*, vol. v. 433, this office was held to be assignable; and the mortgage was established except as to by-gone profits. *Ex parte Wilson*, 2 Vea. & Bea. 252; *Gresley v. Adderley*, 1 Swanst. 573.

a variety of different characters, in all of which some points of resemblance may exist; still, in none of them is that resemblance complete.

A mortgagor is at least as much like a receiver, as he is like a tenant at will: in fact, however, he is neither. He is not tenant at will, because he is not entitled to the crops after the will is determined: and the mode of laying the demises in ejectment for the recovery of mortgaged premises, is not confined in point of time, as in cases where possession is sought to be recovered from a tenant at will. He is not a receiver; for, if he were, he would be obliged to pay all the rents and profits to the mortgagee, which is not the case. *Birch v. Wright*, 1 T. R. 383. Since, it is well settled, a mortgagor, if in personal possession, does not pay rent; and if he receive the rents from the actual occupier, does not receive them for the mortgagee; who is never entitled to a retrospective account of rents. *Ex parte Wilson*, 2 Ves. & Bea. 252; *Gresley v. Adderley*, 1 Swanst. 579.

COLLIER v. COLLIER.

[1796, FEB. 11.]

TESTATOR gave his wife 400*l.* a-year in addition to 500*l.* a-year under her settlement, in consideration of the expense and care she would incur in the maintenance of their children: she must maintain them when at home; but is not to be charged with education, or maintenance at school.

SIR GEORGE COLLIER by his will gave to his wife 400*l.* a year in addition to 500*l.* a year, to which she was entitled by her marriage settlement, to be paid half yearly, "in consideration of the expense and care she will incur in the maintenance of our children."

There were six children; two sons and four daughters. The question was, whether Lady Collier must defray the expense of maintenance and education out of this additional provision; or to what extent.

Mr. *Mansfield*, for Lady Collier. The word "education" does not occur. The testator could not mean to impose upon Lady Collier the actual expense of the maintenance and education of the boys at school.

LORD CHANCELLOR [LOUGHBOROUGH]. There is an express cause of the legacy: but there is nothing in the will to limit their maintenance to 400*l.* a year; nor is it put by way of condition. I think, there is this effect to follow; that the Master in computing what is proper must have regard to the circumstance, that their mother's house is their home. He could not mean, (it would destroy the purpose) that she should be laid under a temptation to spoil the boys by keeping them at home (a).

IN the principal case there was no intimation in the testator's will, that he intended the sum he gave his wife "in consideration of the expense she would incur in the maintenance of their children," was intended to cover the charges of

(a) The Lord Chancellor offers this quiet tribute to the public schools of England, to enjoy which children must leave their homes.

their education; and, looking at the rank and circumstances of the family, that was not the reasonable construction. But, even where a testator has directed a certain sum to be paid to his widow, expressly for the education, as well as the maintenance, of their children; it is competent to the Court to order that allowance to be increased, if circumstances seem to justify the augmentation, and the children are entitled to the fund absolutely amongst them. *Aynworth v. Pritchett*, 13 Ves. 321. And see, *ante*, notes 2 and 3 to *Crickett v. Dalby*, 3 V. 10.

PYM v. BLACKBURN.

[* 34]

[ROLLS.—1796, FEB. 9, 15.]

AGREEMENT in writing between landlord and tenant signed by the landlord for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed: but blanks were left for the day of the commencement; the repairs being completed, the landlord tendered a lease to commence from that time, and on refusal filed a bill; the answer admitted, that the agreement was accepted; but insisted, that the new lease was not to commence till the expiration of the old; and so it was decreed; parol evidence being refused. (a)

Tenant covenanting to keep and leave the premises in repair must rebuild in case of fire, (b) [p. 34.]

FRANCIS PYM was seised in fee of a public-house in Arlington Street, called the Blue Posts. John Stephenson was lessee under him for the term of 21 years commencing at Michaelmas 1774, at the yearly rent of 60*l*. In 1791 the tenant made application for another lease; and after some treaty an agreement in writing was drawn up setting forth the particulars of the repairs necessary, and proceeding thus: "It is this day agreed between Francis Pym, Esq. and Messrs. Stephenson and Co. as follows: that the said Messrs. Stephenson and Co. shall and with all convenient speed and in a good, substantial, and workman-like manner, repair or cause to be repaired the dwelling house and premises in Arlington Street, known by the sign of the Blue Posts, now in the occupation of Mr. Thomas Hearse, in the several particulars herein before set down and described, to the satisfaction of Mr. Martin Cole or any other surveyor, the said Francis Pym may appoint; and after the said repairs shall be completed, that they will accept a lease of the said house

(a) See 1 Story, Eq. Jur. § 765-768.

(b) This point was expressly determined in *Phillips v. Stevens*, 16 Mass. 238. Where a party by his own contract, creates a duty or charge upon himself, he is bound, notwithstanding any inevitable accident, to make it good, if he can. Thus a lessee could not be released from his covenant to pay rent, though he had been driven from the premises by public enemies. *Paradine v. Jane*, Aleyn, 26; *S. C.* Style, 47; *Mark v. Cooper*, 2 Strange, 763; *S. C.* 2 Ld. Raym. 1477; *Balfour v. Weston*, 1 T. R. 310; *Wallon v. Waterhouse*, 2 Saund. 422 note (2). So in a covenant in a lease of a mill for years, to pay rent, the rent may be recovered after a destruction of the mill by fire, although the lessor does not rebuild. *Fowler v. Bott*, 6 Mass. 63. See also, *Hallett v. Wylie*, 3 Johns. 44; *Pollard v. Shaaffer*, 1 Dall. 210; *Leeds v. Cheetham*, 1 Sim. & Stu. 146; *White v. Wagner*, 4 Hogan, 373; *Wagner v. White*, Id. 564.

and premises for a term of 31 years from the day of under the yearly rent of 85*l.*, payable quarterly, clear of all deductions; in which lease shall be contained the usual provisos and covenants for payment of the rent, to keep the premises in repair, to leave them so at the end of the term, to pay all the taxes, and to paint all the outside wood and iron work once or oftener every seven years of the term; and the said Francis Pym agrees to grant the said Messrs. Stephenson and Co. a lease of the said premises upon the terms and conditions before mentioned, at any time after the said repairs shall have been well and effectually made, as aforesaid: as witness their hands the 7th day June, 1791.

FRANCIS PYM."

"Witness, WOLLASTON PYM."

In 1793 Mr. Pym filed the bill against Stephenson, praying, that the Defendant might be decreed specifically to perform the said agreement and to accept a lease according to the tenor and effect of the said agreement. The bill set forth the agreement; and charged, that the said agreement was duly executed by the Plaintiff, and delivered to the Defendant, who accepted the same, and thereupon began to make such repairs to the said house, as [* 35] were *in the said agreement mentioned; and the said repairs were completed according to the terms of the said agreement at or about Christmas next after the date of the said agreement; and that the Plaintiff tendered a lease.

The Defendant Stephenson by his answer stated, that the Plaintiff at first refused the application on account for his intention of letting the premises as a private house: but the Plaintiff promised the Defendant a preference for a farther term of thirty-one years to commence at the expiration of the said term of twenty years in case the Defendant should choose to accept it at a rent to be fixed by the Plaintiff; that afterwards Martin Cole called to say, the Plaintiff expected a rent of 85*l.* a year: but neither at that time nor at any other time previous to the repairs being made did the said Martin Cole propose, that the Defendant should surrender the old term; nor did the Defendant either then or at any other time before or since ever consent, promise, engage, undertake, or agree, to surrender the same or any part thereof, or that the term to be granted by the Plaintiff to the Defendant should commence at any time prior to the expiration of the term then and now held by the Defendant in the premises; and that if the Plaintiff or Cole had insisted on the Defendant's surrendering the said term, or that the new lease should commence at any time previous to the expiration of the said subsisting lease, the Defendant would not have consented thereto, but would rather have given up the premises at the expiration of the subsisting lease. The answer admitted the agreement to the effect set forth in the bill; but stated, that no draft of the agreement was submitted to the Defendant; that the agreement contained no article, that the Defendant was to surrender his subsisting lease;

and that he understood, the occasion of the blanks in the said agreement for the date of the commencement of the term arose from the agreement having been signed by the Plaintiff in Bedfordshire or some other place at a distance from London, where he could not conveniently obtain the counterpart of the said lease in order to insert the date, at which the subsisting lease would expire. The Defendant admitted, that he accepted the agreement, and began to make the repairs according to the agreement under the direction of Cole, whom the Plaintiff employed; that he laid out 937*l.* 6*s.* 3*d.* and the repairs done were nearly equal to rebuilding. The answer farther stated, that the rent, at which the premises were *let by the Defendant to Hearse the under-tenant, was [*36] 130*l.* 17*s.* a year; therefore the clear rent to the Defendant is not 5*l.* per cent. upon the sum laid out in repairs; that the repairs were not completed till about Midsummer 1792; that Cole on behalf of the Plaintiff continued to receive the rent under the subsisting lease for one quarter after the date and execution of the said agreement, namely, after the 29th of September, 1791, though if the Defendant had agreed to surrender his term immediately after the date of the said agreement, as it was dated more than a fortnight previous to Midsummer, 1791, the Plaintiff would have been entitled to the increased rent from the 24th of June, 1791; that for that quarter neither the Plaintiff nor Cole ever applied for any other rent than under the old lease. The Defendant admitted the tender of a lease for thirty-one years, commencing from the 25th of December, 1791; whereas it ought to commence from the 29th of September, 1795; that in the lease tendered the Defendant is subject to leave the premises in a good state of repair notwithstanding any casualties by fire, though by the subsisting lease the tenant is not bound to repair damage by fire; that others of the covenants were unusual; therefore the Defendant refused to accept the said lease. The answer offered to give up the agreement and all right to a new lease on being paid the money expended.

Both parties went into evidence. Martin Cole deposed, that the Defendant applied to him to procure a lease upon any terms the deponent thought proper. The deponent proposed a lease for thirty-one years at 85*l.* a year, Stephenson to repair, and the subsisting lease to be given up immediately upon the repairs being completed; the tenant to be allowed six months for the repairs; till which time the house was to remain at the old rent, and from the time of the repairs being completed the new rent to commence, and also the new lease, and the old one to be cancelled. The repairs took somewhat more time than was expected; and the Plaintiff agreed to the Defendant's holding half a year at the old rent. The Defendant acknowledged to the deponent the great profit, he received from the house, and his obligation to the deponent for getting him the new lease; and said, he would have given a much higher rent rather than not have it again.

The Defendant Stephenson died; and the cause was revived against his representative.

Feb. 15th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This case is attended with particular circumstances. The first question, that I thought deserving consideration, is, whether under all the circumstances of the case, and the uncertainty, that arises upon the agreement, parol evidence ought to be admitted to explain that, upon which the parties differ so widely: but upon consideration of the nature of the bill I cannot admit the evidence under all the circumstances. It is necessary to decide upon the bill and answer and the fact not arising upon parol evidence; viz. the existence of the former lease, as it stands upon the allegations in the bill and the answer. It is to be recollected, that the bill is brought by Mr. Pym. I do not say, what the case might be, if the Defendant had brought his bill for a specific performance. It is insisted for the Plaintiff, that the true meaning of the agreement was, that as soon as the tenant could conveniently repair these premises, without fixing any time, from which he was called upon so to do, from that period the old lease was to be surrendered, and a new lease to be granted. The Defendant swears, he never made such an agreement, or understood any such thing; that he never did intend or mean to surrender his lease; that he understood, the meaning of the blanks was the day, that lease would expire; which the Plaintiff, not having the lease by him in the country, could not fill up. Suppose the Plaintiff meant what he says: is the Defendant bound to perform an agreement, the Plaintiff understands one way, but which the Defendant had a right to understand another? Has the Plaintiff made out, that the Defendant acceded to that agreement? Did he ever accept an agreement binding himself to surrender the existing lease and take that tendered by the Plaintiff? I admit, there is difficulty on both sides: but (though the Plaintiff, I doubt not, meant what he says,) the true construction is so much more in favor of the Defendant, and a construction a man had a right to act upon, that I cannot compel him to perform an agreement so strange even according to the plaintiff's construction; for if the term of the repairs being completed was the point of time, is it not common sense to say that? But was it not more proper, that he should fix a time, within which it should be done? The Plaintiff by his negligence has drawn himself into an agreement, he never meant to make.

[*38] If I had been to read this agreement without any suit, *I should have supposed, that the Defendant had four years to make the repairs in. He has fulfilled the agreement so far by completing the repairs. I cannot do what the Plaintiff desires. I cannot collect, that the Defendant ever consented to surrender his lease and take a lease from any other time than the expiration of the former. It would be very dangerous upon this bill and answer to permit parol evidence on either side. To let in the evidence of the Plaintiff's surveyor in opposition to the answer would be very dangerous. Therefore, as it stands, the plaintiff is entitled to a spe-

cific performance, if he insists upon it: but he has not made out any case for a decree, that the Defendant shall accept a lease to commence at a time prior to the expiration of the former lease.

The Defendant is wrong in one point. He is bound to rebuild in case of fire, being bound to leave the premises in good and sufficient repair, and there is no exception of casualties by fire. The Plaintiff is right in that (1).

Declare, that the Plaintiff is not entitled to a specific performance of the agreement in question for the acceptance of a lease by the Defendant to commence from an earlier date than Michaelmas, 1795; and let the Master settle a lease according to the said agreement commencing from Michaelmas, 1795, in which all parties are to join, as the master shall direct; and give no costs on either side down to this time: but the Defendant by his answer submitting to give up all right and title to a farther lease under the said agreement upon the Plaintiff's paying the sum of 937*l.* 16*s.* 3*d.* the sum expended by him in repairs, let the Plaintiff before Lady-day next declare, whether he will accept the said offer; and in case he shall accept the said offer, then let him pay to the Defendant the costs of this suit, to be taxed by the Master, and also the said sum of 937*l.* 16*s.* 3*d.* after a deduction of the arrears of the rent due upon the former lease, and also rent for the said premises after the rate of 85*l.* per annum, from Michaelmas last to Midsummer next, to be ascertained by the Master, in case the parties differ; and let the Defendant deliver up to the Plaintiff possession of the said premises at Midsummer next, and also the said agreement to be cancelled (2).

1. PAROL evidence may, possibly, in some cases, be of such a nature as to enable a defendant to resist specific performance of a written contract; but it never can entitle a plaintiff to call upon a Court of Equity to execute, in his favor, a written agreement, with an addition, or variation, introduced by parol testimony. See, *ante*, notes 1 and 3 to *Calverly v. Williams*, 1 V. 210, the note to *Hare v. Shearwood*, 1 V. 241, and notes 2 and 3 to *Brodie v. St. Paul*, 1 V. 326.

2. As a tenant who has bound himself, in general terms, to leave the premises in good repair, must rebuild, if a casualty by fire occurs; so, although his covenant to repair contains an exception in case of damage by fire, the tenant can not, by force of this exception, (should such an accident happen,) protect himself, either at Law, or in Equity, against the effect of a separate, independent covenant to pay the rent during the term. *Doe v. Sandham*, 1 T. R. 710; *Hare v. Groves*, 3 Anstr. 693, 699; *Holtzapfell v. Baker*, 18 Ves. 119.

(1) *Bullock v. Dommitt*, 6 T. R. 650.

(2) *Brodie v. St. Paul*, *ante*, vol. i. 326. The cases, that upon equitable grounds have been exempted from the operation of the Statute of Frauds, are 1st, Where in consequence of fraud the provisions of the Statute have not been complied with: *Rockwood v. Rockwood*, Cro. Eliz. 163, 1 Leon. 192; *Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchford*, 2 Vern. 506; *Devenish v. Baines*, Pre. Ch. 3; *Mallet v. Halfpenny*, cited Pre. Ch. 404; *Lady Montacute v. Maxwell*, Pre. Ch. 526; 1 P. Wms. 618; 1 Stra. 235; 1 Eq. Ca. Ab. 19; *Chamberlaine v. Chamberlaine*, 2 Freem. 34; 2 Eq. Ca. Ab. 43, and cited Pre. Ch. 3; *Berenger v. Berenger*, cited in *Lord Walpole v. Lord Orford*, post, 410, from Lord Nottingham's manuscripts; *Sellack v. Harris*, 5 Vin. 521, pl. 31; *Walker v. Walker*, 2 Atk. 98; *Joyes v. Statham*, 3 Atk. 388; *Reech v. Kennegal*, 1 Ves. 123; 1 Wils. 227; Amb. 67; post, *Barrow v. Greenough*, *Willingham v. Joyce*, 152, 168; 1 Fonb. Tr. Eq. 2d ed. 69. 2dly, Where the agreement has been in part performed:

Floyd v. Buckland, 2 Freem. 268; *Butcher v. Stapeley*, 1 Vern. 363; *Pyke v. Williams*, 2 Vern. 455; *Lockey v. Lockey*, Pre. Ch. 519; *Forcroft v. Lister*, cited in the two last cases, and Pre. Ch. 526; *Binsted v. Colman*, *Borret v. Gomeserra*, Bunb. 65, 94; *Pengall v. Ross*, 2 Eq. Ca. Ab. 46, pl. 12; *Earl of Aylesford's Case*, 2 Stra. 783; *Clerk v. Wright*, 1 Atk. 12; *Lacon v. Mertins*, 3 Atk. 1; *Owen v. Davies*, *Attorney General v. Day*, *Taylor v. Beech*, *Potter v. Potter*, 1 Ves. 82, 218, 297, 437; *Gunter v. Halsey*, Amb. 586; *Whaley v. Bagenal*, 6 Bro. P. C. 45; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404; *Denton v. Stuart*, cited, *ante*, vol. i. 329; 1 Fonb. Tr. Eq. 165, 175; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Redding v. Wilkes*, 3 Bro. C. C. 400. Several other cases are collected 5 Vin. tit. Contract.

For the distinction between enforcing and resisting a specific performance upon parol evidence of a variation from the written contract, see *Rich v. Jackson*, 4 Bro. C. C. 514; *post*, vol. vi. 334, n.; * *The Marquis of Townshend v. Stangroom*, vi. 326; *Woollam v. Hearn*, vii. 211; *Higginson v. Cloves*, xv. 516; *Ramsbottom v. Goeden*, *Winch v. Winchester*, *Cloves v. Higginson*, 1 Ves. & Bea. 165, 375, 524; *Garrard v. Grinling*, 2 Swanst. 244; *Davis v. Symonds*, 1 Cox, 402; *Wall v. Stubbs*, 1 Mad. 80; *Ld William Gordon v. Marquis of Hertford*, 2 Mad. 107. The relief upon part-performance has not been confined to cases, where the Plaintiff cannot be re-instituted; nor to simple restitution or compensation, where the circumstances admit a remedy of that nature. It is now established, that, if the Defendant has concurred in a material, unequivocal act, by which he has attained a substantial part of his object, as taking possession, he shall not be allowed to retract; and the Plaintiff's right to a full execution of the contract has attached: but acts merely ancillary and introductory, as preparing conveyances, making surveys, valuations, &c., though they may have been attended with some expense to the Plaintiff, will not sustain an agreement upon the ground of part-performance: nor an act equivocal, and easily admitting compensation: *post*, *Wills v. Stradling*, 378; *Frame v. Dawson*, vol. xiv. 386: nor is the acceptance of a trifling sum, as earnest, upon an agreement for the sale of an estate sufficient. Considered as binding the parties, it is not the mode pointed out by the statute: as a part-performance, it is too inconsiderable in point of value. Upon the old authorities however this appeared doubtful: *Simmons v. Cornelius*, 1 Ch. Rep. 128; *Voll v. Smith*, 3 Ch. Rep. 16; *Anon.* 2 Freem. 128; *Seagood v. Meale*, Pre. Ch. 560; *post*, 712; *Main v. Melbourn*, vol. iv. 720; 1 Fonb. Tr. Eq. 182, 2d edit.

The question, whether payment of the purchase-money, or a substantial part of it is an act of part-performance, preventing the effect of the statute, appears to be still unsettled: *Clunan v. Cooke*, 1 Sch. & Lef. 22; *post*, *Coles v. Trecothick*, vol. ix. 234; *Buckmaster v. Harrop*, xiii. 456, and the note in page 460; *Ex parte Hooper*, xix. 446, 480, 1 Mer. 9.

A third exception in equity, where the answer admits an agreement, has prevailed to the extent of binding the Defendant by that admission: *Croyston v. Banes*, *Symondson v. Tweed*, Pre. Ch. 208, 374; *Spurrier v. Fitzgerald*, *post*, vol. vi. 548. In *Mortimer v. Orchard*, *ante*, ii. 243, as there was a part-performance, evidence was received: for the Plaintiff a single witness proved an agreement different from that charged by the bill: there were two Defendants; who by their answers admitted an agreement different from both; and they were held to that agreement. It has never been pretended, that the admission of an agreement authorizes the Plaintiff to give evidence of the terms. See the concluding observation of the Lord Chancellor, *post*, 382, *Wills v. Stradling*.

The point, whether the Court will compel a discovery as to the fact of an agreement, and permit the Defendant, admitting it, to avail himself of the statute, has been much disputed. The principal heads of argument in support of the equity to have an agreement executed upon the admission of the answer and to compel a discovery, are of this sort. The object of the statute is to prevent fraud and perjury. It is a fraud to refuse to perform an agreement, though not conformable to the provisions of the statute; and the danger of perjury is obviated by confining the relief to the admission in the answer. The discovery is incident to the relief, and the relief to the discovery; for, if in one case the discovery is fruitless, and in the other the relief depends upon the voluntary confession of the Defendant, the jurisdiction is perfectly nugatory. The objections to this equity are these. The frauds, against which the statute is directed, are of a particular species, by setting up fictitious agreements and wills, and sustaining them by perjury.

Though the statute could not be intended to countenance any sort of fraud or perjury, a temptation to perjury is thus held out to the Defendant; who may be released by his own oath from an agreement, which, if not denied by his answer, will be enforced against him, but which the Plaintiff is not permitted to support by evidence. The relief sought is in direct opposition to the statute; the object of which appears to have been to prevent the mischiefs arising from loose contracts and devises by a general rule, that ought not to give way to particular instances of hardship, arising from ignorance, carelessness, or caprice; and, if it was not easy in the case of part-performance to imply fraud from mere neglect or ignorance of a positive public law, it is still more difficult to discover the ground of relief in this instance. The result of the principal cases upon this subject, while it fluctuated in a state of great uncertainty, *Child v. Lord Godolphin*, before Lord Mansfield, 1 Dick. 39; *Whaley v. Bagenal*, 6 Bro. P. C. 45; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, and *Whitchurch v. Bevis*, 2 Bro. C. C. 559, seems to be, that the statute may be used as a bar to the discovery: but it has been since settled upon the authority of Lord Chief Justice Eyre, Lord Loughborough, Lord Eldon and Sir William Grant, that the Defendant, by his answer admitting the agreement, but insisting upon the statute as a defence to the [* 40] relief, shall not be compelled upon that admission to perform the agreement: *Eyre v. Iveson*, *Stewart v. Careless*, cited 2 Bro. C. C. 563, 564; *Rondeau v. Wyatt*, 2 H. Black, 63; *post*, *Moore v. Edwards*, vol. iv. 23; *Cooth v. Jackson*, *Sparrier v. Fitzgerald*, vi. 12, 548; *Blagden v. Bradbear*, xii. 466.

The efficacy of the statute has been farther restrained by *Goman v. Salisbury*, 1 Vern. 240; 5 Vin. 522, pl. 38, and *Legal v. Miller*, 2 Ves. 299. The first of these cases only states generally, that it was held, that a written agreement, made since the statute, might be discharged by parol; and the bill for specific performance was dismissed. In each of the two other cases an agreement, executed according to the statute, was discharged by a subsequent parol agreement; of which evidence was given on the ground of part-performance. For this purpose the evidence must prove a distinct, subsequent, independent, agreement; as, except in a case of direct fraud, or mistake and surprise, clearly proved, without any, or without adequate, contradiction, and subject to the distinction between enforcing and resisting a specific performance, evidence of what passed before or at the time of the transaction cannot be received to introduce, vary, modify, or explain, an agreement conformable to the statute, or to introduce any new term: *Binsted v. Colman*, Bunb. 65; *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Hare v. Shearwood*, 3 Bro. C. C. 168; *ante*, vol. i. 402; *Rich v. Jackson*, 4 Bro. C. C. 514; *post*, vi. 334, n.; *Rosamond v. Lord Milsington*, where Lord Kenyon, when Master of the Rolls, refused parol evidence, that an annuity was to be redeemable. *Post*, *The Marquis of Townshend v. Stangroom*, vol. vi. 328; *Higginson v. Clowes*, xv. 516; *Hope v. Atkins*, *Halliley v. Nicholson*, 1 Pri. 143, 404. As to a will, see *Lord Walpole v. Lord Orford*, *post*, 402. All these questions are considered, and the authorities examined and arranged, with great ingenuity, minuteness and accuracy, by Mr. Fonblanque, *Treat. on Eq.* 178, 182, 2d edit.; Mr. Sugden, *Law of Vendors and Purchasers*, 93 to 153, 5th ed. and Mr. Beames, *Elements of Pleas in Equity*, 171 to 182.

LOCKE v. BROMLEY.

[ROLLS.—1796, FEB. 17.]

COSTS personally against an uncertificated bankrupt in a case of fraud and misconduct.

THE bill was filed to have a promissory note of the Plaintiff delivered up upon the following facts; which were fully made out by the answer and evidence. The Defendant being a collector of the land and window taxes in Oxford suffered a distress to issue against him for a balance of 124*l.* due to the Receiver General. As the Receiver General was not to be in Oxford for some days, the Defendant requested the Plaintiff, who was a banker, to receive the money, in order to remove the bailiffs; who were satisfied by a deposit of the money with the Plaintiff. The Plaintiff accordingly received the money, and gave the note in question: but it was not made negotiable. The Defendant afterwards pretended [* 41] to have lost the note and *gave an indemnity. He then pretended to have found it; and at a meeting between the parties he pretended to burn the note; and his indemnity was delivered to him. Afterwards the note appeared in the hands of a third person with warrant to sue. The Defendant was a bankrupt; and had not obtained his certificate. His assignees and the representative of the assignee of the note, who was dead, did not resist the bill, being convinced of the fraud. The Defendant forced on the cause by motion to dismiss the bill for want of prosecution.

THE MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN], said, the Plaintiff ought only to have given an accountable receipt. The note was ordered to be delivered up with costs personally against the Defendant (1).

A BANKRUPT who has acted fairly may be entitled to protection in Equity against some of those liabilities to costs which the strict rule of common law imposes on him; but his improper conduct may deprive of all claim to this protection. *Ex parte Seaman*, 1 Glyn & Jameson, 260. And even when the Court of Equity holds it right to discharge a bankrupt who has been taken in execution for the costs of a trial at law, directed by the Court, with a reservation of farther directions, it by no means follows that the bankrupt will not ultimately be ordered to pay the costs of the whole proceedings both at Law and in Equity. *Ex parte Gregory*, 1 Glyn & Jameson, 179. But, as a bankrupt who has not obtained his certificate has no means of paying costs, (*Ex parte Cuthbert*, 1 Mad. 79,) the general rule subject to the qualifications already stated, is, not to make an order upon a bankrupt personally for payment of costs; *Ex parte Parker*, Buck, 314; though they may be ordered to be paid out of his estate, where that affords a surplus, after payment of all other demands. *Bromley v. Goodere*, 1 Atk. 81.

(1) *Ante*, *Ex parte Thorpe*, vol. i. 394; *Ex parte Shaw*, ii. 40; Beames on Costs, 329, 330.

SWANN v. FONNEREAU.

[ROLLS.—1796, FEB. 17, 18, 23.]

By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of grantor's term, in trust to raise an annuity for the lives of the wife and her mother and the survivor: then reciting, that the remainder of the term might expire in the life of the wife or her children, therefore to make a provision for her and her children by her then or any future husband the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise after the deaths of the grantor and the mother of the wife 100*l.* annually, to be placed out in the purchase of freehold lands or hereditaments or leasehold estates for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased or the interest, produce and profits, to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life; and after her decease to apply the said rents and profits or interest money towards the support and maintenance of such child and children of her, as should be living at her death, till the youngest should be twenty-one; and then to be possessed of such estates so to be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child and children, in such share and proportions, payable at twenty-one, as the survivor of the husband and wife should by will or deed direct, limit and appoint; in default thereof, to the use of all such children equally to be divided at their respective ages of twenty-one: but if she should die without leaving any child or children, or all should die under twenty-one, then to the use of the grantor, his heirs, executors, administrators and assigns; and after paying the said annuities to be possessed of all the surplus money arising from the said tolls during the remainder of the term for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a-year, and laid out in stock the sums received, and the produce. One son was the only issue. He attained twenty-one in the life of his mother; and survived her. The Court would not invest the fund in land; but held it with the accumulations from the death of the grantor and the future payments a vested interest in the son at twenty-one, and as personal estate belonging to his administrator. (a)

Grant to be taken as strongly in favor of the objects and against the grantor, as fair inference can allow, (b) [p. 48.]

By a settlement dated the 26th of December, 1763, reciting the marriage of John Sandys and Elizabeth Mary Rose, and articles previous thereto, and that Thomas Fonnereau had paid 500*l.* as the

(a) Nothing is regarded in equity as done, but what ought to be done. 1 Story, Eq. Jur. § 649, 790. And it would not be consistent with Equity to exert one of its more peculiar powers to impress personal property with the character of land, in the absence of strong grounds therefor. See, *ante*, note (b) to *Walker v. Denne*, 2 V. 170; note (a) to *Rashleigh v. Master*, 1 V. 201; *Craig v. Leslie*, 3 Wheaton, 578; *Commonwealth v. Martin*, 5 Munf. 122; *Dade v. Alexander*, 1 Wash. 30.

(b) In cases of grants by the King, in virtue of his prerogative, the old rule was said to be, that nothing passed without clear and determinate words, and the grant was construed most strongly against the grantee, though the rule was otherwise as to private grants. 1 Kent, Com. 460, note (5th ed.); *Stanhope's case*, Hobart, 243; 2 Black. Com. 347. In the case of *Sutton's Hospital*, 10 Co. 27, the doctrine was, that a grant for a charitable purpose is taken most favorably for the object. For a full and clear view of the ancient law on the construction of royal grants, see the opinion of Story J. *Charles River Bridge v. Warren Bridge*,

marriage portion of the said Elizabeth Mary Rose, it was witnessed, that in consideration of the said marriage, and to make a provision for Elizabeth Rose, mother of the said Elizabeth Mary, and for the said Elizabeth Mary, the wife of John Sandys, and her [* 42] children, and *also in pursuance of the said articles,

Thomas Fonnereau assigned to trustees, their executors, administrators and assigns, all and singular the tolls, dues and duties, payable or arising from the lights and light-houses in Cornwall, called the Lizard Lights, to hold to them, their executors, administrators, and assigns, for the remainder of his term of 61 years, upon the several trusts in the said articles of agreement; that is to say, upon trust to raise the sum of 200*l.* annually during the lives of Elizabeth Rose and Elizabeth Mary Sandys and the survivor, to be paid to them in moieties for their sole and separate use respectively, not subject to the debts or control of John Sandys or any husband or husbands, they or either of them should happen to marry; and after the death of them to pay the sum of 200*l.* annually to the survivor during her life, for her sole and separate use as aforesaid; and also upon trust after the death of Thomas Fonnereau, in case Elizabeth Rose should be then living, to raise the farther annual sum of 100*l.* to be paid in manner aforesaid from and immediately after the death of Thomas Fonnereau to Elizabeth Rose for her life for her sole and separate use; and reciting, that the remainder of the said term of 61 years, which Thomas Fonnereau had in the said tolls, dues and duties, might happen to expire in the life-time of the said Elizabeth Mary, wife of John Sandys, or in the life of such child or children, as the said Elizabeth Mary might have, therefore to make a provision as well for the support and maintenance of the said Elizabeth Mary, as of such child or children, as she might happen to have by John Sandys or any other husband, she might happen to marry, the said Thomas Fonnereau did declare, that the trustees, their executors, administrators and assigns, should be possessed of all the said tolls, dues and duties, for the remainder of the said term of 61 years upon farther trust, that they the said trustees or the survivor or the executors or administrators of such survivor should raise out of the said tolls, dues and duties, annually after the death of the survivor of Thomas Fonnereau and Elizabeth Rose during the remainder of the said term the farther clear yearly sum of 100*l.*, to be by them the said trustees placed out in the purchase

11 Peters, 589-598. In matters of private grants or contracts the rule that language is to be taken most strongly against the party using it (*verba ambigua fortius accipiuntur contra proferentem*), though it be a rule, according to Lord Bacon, drawn from the depth of reason, applies only to cases of ambiguity in the words, or where the exposition is requisite to give them lawful effect. It is a rule of strictures and rigor, and not to be resorted to but where other rules of exposition fail. The modern and more reasonable practice is to give to the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract without adopting either the rule of a rigid or of an indulgent construction. 2 Kent, Com. 556 (5th ed.); Bacon's Maxims of the Law, No. 3. See, also, *Jackson v. Blodget*, 16 Johns. 176. The rule seems to be approved by Dr. Lieber, Hermeneutics, 130, chap 5, § 7.

of freehold lands or hereditaments or of leasehold estates for two or three lives then in being, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be by them invested in government securities upon trust, that they, the said trustees or the survivor or the executors or administrators of such survivor, should, in case the said Elizabeth Mary should survive the said term of 61 years, pay the rents and profits of such estate or estates so to be * purchased or the interest, pro- [* 43] duce and profits, to arise from the money so intended to be placed out, until such purchase should be made, unto the said Elizabeth Mary for her life, for her sole and separate use; and after her decease upon farther trust to apply the said rents and profits or interest money towards the support and maintenance of such child and children of the said Elizabeth Mary, as should be living at her death, until the youngest should attain twenty-one; and as soon as the youngest of the said children should attain twenty-one, then upon trust, that they the said trustees or the survivor or the executors or administrators of such survivor, should be possessed of such estates so to be purchased or of the money arising from the said last mentioned annuity not placed out in one or more purchase or purchases to the use of such child and children of the said Elizabeth Mary in such shares and proportions payable at their respective ages of twenty-one years, as the survivor of the said John Sandys and Elizabeth Mary, his wife, should by will or deed direct, limit and appoint; and in default of such direction, limitation and appointment, to the use of all such children equally to be divided between them at their respective attainment of the age of twenty-one years: but if the said Elizabeth Mary should die without leaving any child or children living, or if all such children should die, before they respectively attain twenty-one years, then upon trust and to and for the use of the said Thomas Fonnereau, his heirs, executors, administrators and assigns; and after paying the several annuities for the purposes aforesaid that the said trustees should be possessed of all the surplus money arising from the said tolls, dues and duties, during the remainder of the said term to and for the sole use of the said Thomas Fonnereau, his executors, administrators and assigns.

The term of 61 years mentioned in the settlement commenced in 1752. Elizabeth Rose died in 1768. Thomas Fonnereau died in 1779. John Sandys died in 1774, leaving John Thomas Sandys his only issue by his wife Elizabeth Mary; who afterwards married — Ivory, and died in 1791 without having had any issue by the second marriage. John Thomas Sandys attained the age of twenty-one in 1786, and died in 1793 intestate, leaving his widow Elizabeth and Martin Sandys, his eldest son and heir at law, and several other children, all infants. The executors of * Thomas Fonnereau paid the annuity of 100*l.* to the [* 44] trustees under the settlement from his death; which money was by them placed out in government securities with the interest and dividends accrued from time to time.

The bill was filed by the administrator of John Thomas Sandys, for an account of what had become due in respect of the annuity of 100*l.* and was paid or laid out, and of the interest, dividends, and profits received and laid out; and that it might be declared, that the Plaintiff as personal representative of John Thomas Sandys is entitled to what has already become due in respect thereof, and the interest, dividends, and profits, that have arisen, and also to the future payments to grow due in respect of the said annuity of 100*l.* during the remainder of the term. The bill stated, that as Elizabeth Mary Ivory did not survive the term, she never was entitled to receive the interest, dividends, and profits of the annuity of 100*l.* so placed out; but the principal of the said yearly sums, as well, such as were laid out, with the interest, dividends, and profits thereof accrued during the life of Elizabeth Mary Ivory, as also the future payments of the said yearly sum of 100*l.* during the remainder of the term, and the interest, dividends, and profits, to accrue, became the absolute property of John Thomas Sandys on his attaining twenty-one, as her only child, and was part of his personal estate at his death.

The executors of Thomas Fonnereau by their answer submitted, whether, as Elizabeth Mary Ivory did not survive the term in which event alone, they insisted, the said interest, dividends or profits, of the accumulation of the said annual payment of 100*l.* were by the settlement directed to be paid to her, the principal of the funds purchased with the said annual payments, with the interest, dividends, and produce, thereof do not belong to them as personal representatives of Thomas Fonnereau as a resulting trust, or as so much of his personal property undisposed of; they farther insisted, that all right to the payment of the said yearly sum of 100*l.* ceased on the death of Elizabeth Mary Ivory, or at least upon John Thomas Sandys's attaining twenty-one; and that all future and growing payments of the said yearly sum of 100*l.* ought to be paid to the Defendants, as such personal representatives.

[* 45] * Martin Sandys, the infant heir at law of John Thomas

Sandys, claimed as real estate the principal of the yearly sums of 100*l.* already placed out, and also of all payments in respect thereof; the right to which, he insisted, during the remainder of the term did not cease by the death of Elizabeth Mary Ivory, or by John Thomas Sandys having attained twenty-one; and ought to be considered as real estate descended to this Defendant.

The Defendant Ivory, as administrator of his wife, claimed the interest and dividends accumulated between the deaths of Thomas Fonnereau and Mrs. Ivory; but that claim was given up without argument.

Mr. *Grant* and Mr. *Stratford*, for the Plaintiff.

1st. The contingency of Elizabeth Mary Sandys surviving the expiration of the term relates only to the provision made for her. There was no necessity to make a provision for her in any other event; as she had another provision out of the profits of the term,

as long as it should endure. But that did not extend to her children; who would have no provision, if they are not entitled independently of the contingency of their mother's surviving the expiration of the term. The object was to provide for the children of Elizabeth Mary Sandys even by a future husband; and the deed is to be taken most strongly against the grantor.

2dly. As to the produce of the fund: John Thomas Sandys having become entitled to the fund at twenty-one absolutely is to take it with all the accumulations from its first establishment; which are to follow the principal. He took a vested interest at twenty-one, subject to be postponed in the enjoyment to his mother, if she should survive the expiration of the term. No part is undisposed of. As long as any part of this family was capable of taking, the settlor meant to reserve nothing to himself. He confined the application of the produce for maintenance to the event of infancy of the children at the death of their mother; which event has not happened.

3dly. As to the duration of the trust: the accumulation is to continue as long as the term by the express words. There is nothing to determine it either upon the death of Elizabeth Mary Sandys or on her son's attaining twenty-one. The Court would *not by mere inference control positive words: but that [*46] construction could not be intended; for then if the mother had died leaving an infant child, in one case, there would be no provision for that child; in the other, there would be only the produce between her death and his age of twenty-one; perhaps but a few days.

4thly. As to the claim of the heir: the settlor does not positively direct each sum of 100*l.* to be laid out in land; but leaves a discretion in the trustees with regard to the time, at which the accumulation may be of sufficient magnitude to be invested in land. It was clearly not intended to be done every year. He had no absolute intention to make it land from the beginning. The Court is therefore to take it as they find it. He had in contemplation the case of its remaining as money; for he calls it "rents and profits" or "dividends and interest;" and uses the word "payable." No doubt John Thomas Sandys might have elected to take it either as land or money: but it does not appear, that he did any act amounting to an election. Whether land or money, it is to be divided in the same manner. The settlor does not absolutely direct it to be laid out in estates in fee simple; but gives an option to invest it in leasehold estates for lives. The trustees having made no purchase, that is evidence they did not think the sum of sufficient magnitude. *Walker v. Denne*, ante, Vol. II. 170.

Mr. Richards, for the heir of John Thomas Sandys, concurred with the Plaintiff in the three first points: but upon the fourth he contended, that the heir was entitled to this property as real estate descended to him.

By the words there is no discretion in the trustees. It is to be laid out in stock only until a convenient purchase can be had. He

anxiously guards against an interest for years. The Plaintiff must show, he meant leases for lives, that go to the executor: otherwise they must be construed such, as shall go to the heir, according to his clear intention as to the estates in fee. If personal estate was his object, there were many ways more applicable. Why not continue it in the funds? Why say freehold leases? As to the word "payable," he clearly did not mean, that it should be money. That word is inapplicable to leases for years. The words "direct [* 47] and appoint" and particularly "limit" apply to real estate; and "equally to be divided" only means as tenants in common.

Mr. *Lloyd* and Mr. *Stanley*, for the executors of Thomas Fonnereau. Elizabeth Mary Sandys was provided for during the term by the annuity of 200*l.* during the lives of her and her mother and the survivor. The intention was, that she should have no other provision. As she did not survive the term, none of the trusts arose either for her or her children. This fund was intended as a provision for her and her children, if the other provision failed. The event not having taken place, it must result. If any trust arose, it ceased either on the death of Elizabeth Mary Ivory or on her son's attaining twenty-one; and then the surplus results. The produce between the deaths of Thomas Fonnereau and Elizabeth Mary Ivory is also undisposed of. She is not entitled, because there is no direction or intention, that, unless she survived the term, she should have any thing. There is nothing to show, that the rents and profits were to accumulate for the children, if she could not take them.

Before the reply the point that the trust ceased at the death of Mrs. Ivory or at her son's age of twenty-one, was given up by the executors of Thomas Fonnereau.

Mr. *Grant* in reply. The burthen of proof lies entirely upon the heir; the actual state of the fund being money. The discretion in the trustees is to wait, until a sum, they should think reasonable, should accumulate. They have also a discretion as to the kind of landed property. They are not compelled to purchase descendible freehold leases; but might purchase such, as would go to the executor as assets. If they had purchased estates for lives, they could not declare a trust so as to go to the heir; but must have declared it to be the trusts of the deed: viz. for the children of Mrs. Ivory. They could not declare a trust for each child and the heirs of each. They must have left the law to determine, how such interest should go; and that is not *in equilibrio*; for the law says, it shall go to the executor or administrator. It is clearly within the principle of *Walker v. Denne*; the Court seeing no intention to stamp definitely and imperatively * the character of land upon the fund, and finding it money will not interfere. According to the general intention to make an equal distribution it is more convenient to let it continue money.

As to the produce between the deaths of Thomas Fonnereau and Elizabeth Mary Ivory there is certainly no direct disposition: but a

general intention appears to give it away from the grantor and to appropriate it to this family ; and that is sufficient in marriage articles. The fund is expressly created for the benefit of this family, and has no reference to any benefit, the settlor was to take out of it. The trust ought not to be construed to result to him in any other case than that he has stated, viz. the total failure of this family. The only way, in which the produce of this interval can be disposed of for the benefit of the family, is to give it to the son.

Feb. 23d. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This question depends entirely upon the construction of the articles and the settlement executed in consequence of them by Thomas Fonnereau ; who either was or appeared to be the father of Elizabeth Mary Sandys. The settlement varies from the articles in a very few particulars, and those chiefly verbal alterations. This being the grant of Thomas Fonnereau, it is truly argued, that the grant is to be taken as extensively in favor of the objects of the settlement, the wife and her children, and as strongly against the grantor, as fair inference can allow ; and here is a positive grant during the whole remainder of this term of 200*l.* a year, and after the grantor's death, an additional 100*l.* a year during the remainder of the term ; and the object is to provide support and maintenance for Elizabeth Mary Sandys and her children ; and there is no reservation of any benefit to himself, except that in case of no children, or if any, in case of the death of all under the age of 21, the surplus, and that only after payment of these annuities, is reserved to him. But it is contended, that when the deed is canvassed, there is no express application of the rents and profits during the life of Elizabeth Mary Sandys. It was also contended, but not I think with great hopes of success, that the contingent event of her surviving the term was the only one, upon which any benefit was to arise to the issue of the marriage. I cannot raise such a construction. That was not the contingency, upon which it was to arise. The intention was, that *100*l.* should be raised at all events [* 49] till the end of the term ; and if Elizabeth Mary Sandys should be living at the expiration of the term, that she should enjoy the rents and profits of the accumulated fund during her life ; but that at all events the benefit should accrue to her or her children after her death, whether that should happen during the term or afterwards.

Upon the strict words of this deed it is not clear, that if Elizabeth Mary Sandys had survived the term, she would not have been entitled to all the accumulated interest, that had arisen ; for the words would carry it to her. If she had survived the term, perhaps a question might have arisen between her and her children, whether the interest of the annual sums raised, as well as the annuity itself, should make the accumulated fund : but without determining that I am clearly of opinion upon the true construction of the deed and the principles, upon which such a deed must be construed, that it is completely given to her and her children ; and now no question can

arise between her and her children. All the benefit, that could arise to them from the accumulation of the annual payments during the remainder of the term, must be held to have been separated from the rest by Mr. Fonnereau; and the surplus only is reserved to himself; therefore no one claiming under him can claim any thing else from it. It was to become a vested interest in the children, when the youngest should attain 21. The fact being, that there is only one, and that he attained the age of 21 before his death, another question is, what interest he took in the property; whether upon the true construction this annual sum of 100*l.* which, if I am right, is to continue till the expiration of the term, is by the intent of the settlement absolutely directed to be laid out in the purchase of land descendible to the heirs of the children. If that could be fairly collected from the deed, the trustees having neglected or not being able to procure a purchase would not vary the rights of the parties; but it would be considered as if laid out as intended ultimately by the person, who made the settlement.

The question is, whether it can be collected, that there is a clear, manifest, definite and ultimate, intention, that at all events it should be laid out in land descendible to heirs. The principle, upon which Courts have determined all questions of this kind, is this, can it be collected from the deed or will, that that is the ultimate intention of the parties; and that its being in the shape in which it is found, is only temporary. If that is so in this case, the heir is right; and it

is real estate. *Guidot v. Guidot*, 3 Atk. 254, and *Curling* [* 50] *v. May*, * there cited, have clearly laid down what was also adopted in *Soresby v. Hollings*, 6th August, 1740 (1). *Grimmet v. Grimmet*, Amb. 210, and by the Lord Chancellor in *Walker v. Denne*, that whatever a character is imperatively and definitively stamped upon the fund, it shall have that character, unless some person comes *in esse*, who has a right to elect to take it in the other way, and does so (2); and here it is admitted on all sides, that John Thomas Sandys did no act, that can have that effect. There is nothing to show, it was intended to go to the eldest son. There is no entail. If no appropriation is made by the parents, it is for the benefit of all, equally to be divided among them at 21, without words of inheritance. There is nothing therefore to call upon the Court from the nature of the disposition and for the benefit of the parties to lay it out in land for the benefit of the heir. It is much more convenient, that it should not be so laid out. There is nothing in the nature of an estate *per auter vie* to make it descendible to heirs even by the common law. On the contrary if an estate is given to a man for two lives, and no more; if he had died, neither his heir nor executor could claim it; but the occupant: to regulate which two statutes have taken place (3). It was truly said for the Plaintiff, that if the trustees had thought fit to take the alternative given by

(1) 9 Mod. 221.

(2) See the notes, *ante*, vol. i. pages 45, 204.

(3) 29 Ch. ii. c. 3; 14 Geo. II. c. 20.

the settlement, it would have been no transgression or breach of their trust to take that estate *per auter vie* to them and their heirs or executors in trust for the children, and their executors. On the contrary the Court, if they could have sanctioned it, would have ordered it so. It would be a good appropriation. Farther, if they had even purchased an estate *per auter vie*, and declared the trust for the uses of the settlement for the children the Court would have held it personal estate in the children, and to go to their executors. Then it comes within the cases of *Soresby v. Hollings* and *Grimmet v. Grimmet*; where trustees had an option to lay out the fund in land, which would have been under the Mortmain Act, or in estates of another kind, which would have been good; and the Court held, that it was not void (1). In *Walker v. Denne*, the Lord Chancellor has most clearly pointed out the good sense of the determinations, that the trustees having made no election, the Court would act upon the fund in the state, in which they found it; and would not direct it to be laid out, unless they could see a clear, manifest, definitive, intention for that purpose.

Upon all these points I have no doubt, that all the remainder of the term, *as far as this annual sum of 100*l.*, is [* 51] given up to the objects of this settlement; and John Thomas Sandys being the only object, the whole fund with the accumulations and profits and also the future and growing payments became a vested interest in him at his age of 21; and belong to his administrator.

1. THAT delay on the part of trustees, (whether such delay proceeds from fraud or from negligence,) will not be allowed to affect the interests of third persons; see, *ante*, note 6 to *Hutcheon v. Mannington*, 1 V. 366.

2. For some of the leading rules, in cases where money is impressed with real uses; or *vice versa*, where land is directed to be converted into money; and the rights of the several classes of representatives, in such cases; see notes 1, 2 and 3 to *Rashleigh v. Masters*, 1 V. 201; and notes 3 and 4 to *Ex parte Bromfield*, 1 V. 453. As to the right of election under the statute 39 and 40 Geo. III. c. 56, see the note to *Binford v. Bawden*, 1 V. 512.

(1) *Curtis v. Hutton*, *post*, vol. xiv. 537.

WILLIS v. WILLIS.

[1796, FEB. 23, 24.]

SETTLEMENT on marriage to the use of the husband for life; remainder to trustees for 500 years in trust after the death of the husband, and not before, unless with his consent as therein mentioned, to raise portions for younger children, to be paid in such shares, and at such times, as the husband and wife should appoint; in default of appointment to be paid, if but one besides an eldest or only son, 5000*l.*, if two, 6000*l.*, if three, 8000*l.*, and if four or more, 10,000*l.* equally; to be paid respectively at twenty-one, or marriage of daughters if after the age of sixteen, if such times of payment happen after the death of the husband; if in his life, then within twelve months after his decease, and not before, unless with such consent: provided, that if any of such younger children should die before his, her, or their, portions should become payable, so that the number should be reduced to less than four, no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children equal to the sum originally limited for the portion or portions of such child or children, if one, two, or three. Three younger children only survived their father; but more than four had attained twenty-one. The sum to be raised is 10,000*l.* (a)

By settlement, dated the 16th and 17th of August, 1733, made upon the marriage of John Willis and Sarah Fielding, certain real estates in the county of Wilts were conveyed by George Fielding, father of Sarah Fielding, to the use of John Willis for life without impeachment of waste: remainder to trustees to preserve contingent remainders; remainder to the intent to secure a jointure of 700*l.* a year to Sarah Fielding; remainder to the use of trustees for 500 years from the decease of John Willis; remainder to the use of the first and all and every other son and sons of the marriage successively in tail male; remainder to trustees for 600 years; remainder to the first and all and every other son and sons of John Willis by any other wife successively in tail male; remainder to the use of Richard Willis and his issue male in strict settlement; remainder to the right heirs of the Bishop of Winchester for ever. By the same settlement the Bishop of Winchester agreed to vest personal funds to the amount of 21,200*l.* in trustees, upon trust to be laid out in freehold estates to be settled to the same uses.

(a) Parents may make a provision for children which shall depend upon the condition of surviving the parents; but to do so, the intention must be very strongly expressed; for, contrary to the obvious meaning of the expression, it is a rule, established by many decisions, that if portions are directed to be paid at the age of twenty-one, or on the marriage of daughters, with survivorship, followed by a provision, that if they attain those periods in the life of the father, the portions shall not be paid till after his death, yet this shall not prevent the vesting in the life of the father. *Hope v. Chifden*, 6 Ves. 499. For in these cases the Court look upon it as a hard thing to impute to a father that he should mean, where a child dies in his life, having attained twenty-one, or come to marriageable years, and formed a family, that his descendants should have nothing; and feeling that not to be a probable intention in a parent, the Court have thought themselves at liberty to manage the construction of the words as they would not in the case of a stranger, or upon matter of contract, without any mixture of parental feeling. 1 Maddock, Ch. 495, 496.

The trusts of the term of 500 years were declared to be first for securing the jointure ; and subject thereto in the next place, in case there should be one or more child or children, whether son or sons or daughter or daughters of the intended marriage besides an eldest or only son, then and in such case the said trustees and the survivor of them should after the death of the said John Willis and not before, unless by the express consent of the said John [* 52] Willis testified as therein mentioned, by mortgage of the premises or any part thereof for all or any part of the said term or by any other ways or means, as the said trustees or the survivor should think convenient, raise the several sums of money after mentioned for the portion or portions of such child or children, except as aforesaid, to be paid to such child or children, if more than one besides an eldest or only son, in such shares and proportions and at such times, as the said John Willis and Sarah, his intended wife, should direct or appoint ; and for default of such direction or appointment then to be paid as after mentioned : that is to say ; if but one such child besides an eldest or only son, then the sum of 5000*l.* for the portion of such only younger child ; and if two such children, then the sum of 6000*l.* for the portions of such children ; to be equally divided between them share and share alike ; and if three such children, then the sum of 8000*l.* for the portions of such children, to be equally divided between them share and share alike ; and if there should be four or more such children, then the sum of 10,000*l.* for their portions, to be in like manner divided among them : such portions to be paid to them respectively, if a son or sons, at his or their age or ages of 21 years ; and if a daughter or daughters, at her or their respective ages of 21 years or day or days of marriage, which should first happen, so as such marriage should be had after the age of 16 years, in case such respective times of payment should happen after the decease of the said John Willis : but if in his life-time, then within twelve months next after his decease, and not before, unless with such consent and testified as aforesaid : provided, that if any or either of such children, not being an eldest or only son, should happen to die, before his, her, or their, portion or portions should become payable by virtue thereof, so that the number of such younger children should be reduced to less than four, then and in such case no more money should be raised by virtue of the trusts of the said term of 500 years, than what would make the whole sum for the portion of the survivor or survivors of such children, not being an eldest or only son, equal to the sum originally thereby limited to be raised as the portion or portions of such child or children, if one, two, or three, in number, as the case should happen, as therein before was mentioned.

The issue of this marriage were Richard Willis, the eldest son, and eight younger children, namely, Bridget, Isabella, Mary, George, *Hester, Catherine, Sarah, and John. Bridget, Isabella, Catherine, Sarah, and John, died in the life of their father : but some of them had previously attained the age of [* 53]

twenty-one. The other three younger children attained that age and survived their father. Mary Willis married Mr. Spencer, under the age of twenty-one, but with her father's consent according to the directions of the settlement; who gave her 2000*l.* as her share of the portion, there being then five younger children.

The bill was filed by Richard Willis, the eldest son of John and Sarah Willis, for the purpose of raising a sum of 7000*l.* with interest due upon a mortgage of leasehold estates, which was part of the funds provided by the Bishop of Winchester for the objects of the settlement: and that such money might be applied in part of the sum of 8000*l.* for the younger children under the settlement.

The question was, whether the sum to be raised for the younger children was in the event that had happened 8000*l.* or 10,000*l.*

Mr. Mansfield, Mr. Hardinge, and Mr. Stanley, for the Plaintiff. By the words of the settlement, which are peculiar, the sum shall be according to the number of children surviving, when the portions shall be raised. The word "survivor" must apply to something: but it cannot properly be applied to children born after the death of others, who attained the age of twenty-one. With respect to them such children born afterwards cannot be called survivors: but that must be argued upon the construction now attempted.

Solicitor General [Sir John Mitford], Mr. Hollist, and Mr. Cooke, for the younger children. It depends on the construction of the word "payable." It does not mean the time, at which the money is to be actually raised; for if so, as the children might all die in the life of their father, they could make no use of it in his life, unless he appointed. If the number had been reduced to one, and that one had died in the life-time of the father, but above twenty-one, the portion must have been raised; and the rule must be the same as to all. Interest must be calculated from the death of the [* 54] father; the twelve months being given only for the * convenience of the estate. This sort of clause arose from the decisions, that charged the reversion with interest from the age of twenty-one. *Emperor v. Rolfe*, 1 Ves. 208. *Cholmondeley v. Meyrick*, 3 Bro. C. C. 252. *n.* In that the doubt was upon the word "due," not "payable."

LORD CHANCELLOR [LOUGHBOROUGH]. I do not see any such difference between this case and those formerly determined, that should induce the Court to make a different decision. It was clearly stated, that these clauses were framed to obviate the difficulty arising from the determinations, that charged the reversion by permitting interest to be carried on from the age of twenty-one, though there was an estate for life. As soon as these clauses came forward, in *Emperor v. Rolfe*, Lord Hardwicke put a just construction upon them; and he referred the word "payable" to the time in respect of the quality of the child, distinguishing between that and the time, when *ex necessitate* the money was to be *de facto* raised. The only question here is, in what sense I am to understand the words "before his, her, or their, portion or portions should become payable;" whether in

respect of the quality of the person, to whom the payment is to be made, or in respect of the time, when such person could be actually in receipt of the money. It is clear, as it has been stated, that if it does not apply to all the children, it cannot to any. There could be no case, in which, if the number was reduced to one, the portion of that one should not be raised; for the expression in the clause is, "if one, two, or three, in number." If but one had remained, attaining the age of twenty-one, but dying in the life-time of the parent, it is clear, that must have been a vested interest; for there are no words to make it sink for the benefit of the inheritance. Then it cannot apply as to any, be the number what it may, if it cannot as to one. Then consider the power of appointment, and that by an appointment to any child they might have vested the interest of the portion; as in fact was done upon the marriage of Mrs. Spencer under the age of twenty-one, but with consent of the father. *The others having attained that age, at which upon Lord Northington's reasoning it became *debitum in presenti solvendum in futuro*, as to the capacity of the children, they became clearly capable of receiving payment. I have a very accurate note of the settlement itself in *Cholmondeley v. Meyrick*. It does *not [*55] seem to differ in any substantial circumstance from this case. The family clearly conceived, that 10,000*l.* was the sum to be raised; 2000*l.* was given as Mrs. Spencer's share, there being five children. Without any doubt 10,000*l.* is to be raised (1).

1. If a settlement, clearly and unequivocally make the right of a child to a provision, under that settlement, depend upon the contingency of the child's surviving either, or both, of its parents; a Court of Equity has no authority to control such a disposition. *Woodcock v. Duke of Dorset*, 3 Brown, 570; *Powis v. Burdett*, 9 Ves. 435. But if the language of a settlement be at all ambiguous, so as to leave in any degree of uncertainty the period at which, or the contingency on which, the interest shall vest; Courts of Equity have long had a decided leaning, (*Hope v. Lord Clifden*, 6 Ves. 507,) and seem, now, bound by authority, (*Perfect v. Lord Curzon*, 5 Mad. 444,) to make such a construction, even by putting a considerable strain upon language, (*Powis v. Burdett*, 9 Ves. 437; *King v. Hake*, 9 Ves. 444,) as will give *vested* interests to the children of the settlor, when they stand in need of a provision; usually, as to sons, at the age of twenty-one; and as to daughters, at that age, or marriage; (*Hougrave v. Cartier*, 3 V. & B. 86; *Hotchkin v. Humphrey*, 2 Mad. 74;) though such interests may not be to take effect, in possession, until after the death of both parents. *Perfect v. Lord Curzon*, *ubi supra*; *Schenck v. Legh*, 9 Ves. 310.

2. Where portions have been charged, by settlement, upon a reversionary term, Lord Alvanley declared it to have been the uniform rule of the Lords Cowper and Macclesfield, followed by all their successors in the office of Chancellor, to lay hold of any words from which it could be fairly inferred, that the portions should not be raised by sale of the term, to the prejudice of the life-estate of the father,

(1) In *Brown v. Fryer*, Chan. June 24, 1799, the Lord Chancellor said, *Cholmondeley v. Meyrick* established this principle; that, although payment is postponed until after the death of the father, yet, if the circumstance, on which the portion attaches, the age of twenty-one, marriage, &c. has happened, the portion is vested: *post*, *Legh v. Haverfield*, vol. v. 452; *Bayard v. Smith*, xiv. 470; *Halifax v. Wilson*, xvi. 168; *Weedon v. Fell*, 2 Atk. 123; *Hougrave v. Cartier*, 1 Ves. & Bea. 79, Coop. 66; *Walker v. Main*, 1 Jack. & Walk. 1; *Hotchkin v. Humphrey*, 2 Mad. 65.

or other author of the settlement. *Lady Clinton v. Lord Robert Seymour*, 4 Ves. 460. And see *Reynolds v. Meyrick*, 1 Eden, 53; *Cholmondeley v. Meyrick*, *ibid.* 85; *Lyon v. Chandos*, 3 Atk. 416. Lord Eldon, however, after a review of all the cases, thought the rule had been most correctly stated by Lord Talbot, (in *Hebblethwaite v. Cartwright*, Ca. temp. Talb. 32,) and that the question ought not to be determined by any argument *ab inconvenienti*; but the time for raising the portions must depend upon the particular penning of the trust, and the intention of the instrument; in construing which, the Court ought not to be eager to lay hold of circumstances. *Codrington v. Foley*, 6 Ves. 380. And see *Lyddon v. Lyddon*, 14 Ves. 566. This and the preceding note are extracted from 2 Hoven-den on Frauds, 114—116.

3. In *Hope v. Lord Clifden*, 6 Ves. 509, it was observed by Lord Eldon, that the principal case was a very strong one; and that if it had been treated as a matter of ordinary contract, without considering the relation of the parties, the decision could not have been what it was, upon the words of this settlement.

HARTGA v. THE BANK OF ENGLAND.

[1796, FEB. 26.]

BANK stock specifically bequeathed to A. in trust to pay a bond debt to himself; and as to the rest for B. for life; remainder over: the trustee, being also executor, transferred to persons not entitled under the will: the Bank is not chargeable.

ELIZABETH STEVENS by her will, dated the 27th of August, 1778, reciting, that there was then standing in her name in the books of the Bank of England the sum of 800*l.* 3 per cent. consolidated Bank annuities, and that she stood indebted to John Stonehouse in the sum of 120*l.*; for which she had given her bond, declared her will to be, that the said bond should in the first place be paid out of the said stock; and the rest and residue of the said stock, after payment of the said bond, she gave and bequeathed to the said John Stonehouse, his executors or administrators, in trust to permit or suffer Anne Bean to receive to her own use, independent of any husband she should marry, the dividends and interest, that should from time to time grow due thereon; and after the decease of Anne Bean she gave and bequeathed the stock to the said John Stonehouse, his executors and administrators, in trust to divide the same among the children of the said Anne Bean lawfully to be begotten, share and share alike; and in case the said Anne Bean should die without leaving issue of her body lawfully begotten, then in trust to pay the sum of 100*l.*, part of the said stock, to her nephew Gerrard Lamb, and the residue of the said stock to her next relations in equal degree, share and share alike. The testatrix, after giving some small legacies, gave the residue of her estate and effects to Anne Bean, and appointed John Stonehouse executor. The testatrix died in November, 1778. The executor proved the will; and upon the 26th of February, 1779, he transferred the sum of 600*l.*, part of the 800*l.* Bank annuities mentioned in the will, to Mary and Elizabeth Culme. Anne Bean

married Daniel Hartga. John Stonehouse died in 1790. In February 1793, the bill was filed by Hartga and his wife and their infant children against the sister of Stonehouse, who was his administratrix, for an account of his personal estate and of the money arising from the sale of the 600*l.* Bank annuities, and of the other money due to the Plaintiffs *in respect of the dividends [* 56] and interest of the said stock received by John Stonehouse; that the stock sold might be replaced; and if the assets of Stonehouse should not be sufficient, then that the Bank might be decreed to replace the deficiency; and that the 800*l.* stock, when made good, might be transferred to the Accountant General in trust in the cause upon the trusts of the will.

The Bank by their answer admitted the entry in their books of so much of the will of Elizabeth Stevens as related to the said 800*l.* stock, and the transfer by Stonehouse to Mary and Elizabeth Culme; and stated, that the dividend due upon the whole stock upon the 1st of January, 1779, was received by Stonehouse; that the 200*l.* stock remaining after the said transfer was standing in the name of the testatrix Elizabeth Stevens; and the dividend, which became due upon the said 200*l.* upon the 5th of January, 1786, and all dividends accrued since that time had been received by the Plaintiff Anne Hartga by virtue of a letter of attorney from Stonehouse, dated the 28th of July, 1785; except two dividends due the 5th of July, 1786, and the 5th of January, 1787, received by John Henry, Attorney to Anna Hartga; and the last dividend due upon the said 200*l.* upon the 5th of July, 1794, was received by her and her husband.

The administratrix of Stonehouse by her answer stated, that he died insolvent. The cause came on upon bill and answer.

Attorney General [Sir John Scott], for the Plaintiffs. In *The Bank of England v. Moffatt*, 3 Bro. C. C. 260, there was no bequest of stock upon particular trusts: but the general residue was blended into one common mass; and the will itself gave the trustees an express power to transfer and alter the funds: the Bank insisted, that it was specific; and therefore no action ought to lie against them. This is a specific bequest; and yet they have permitted it, contrary to their practice then stated, to be transferred, not to the legatee nor the trustee, but to other persons.

Mr. Piggott and Mr. Wooddeson, for the Bank. It appears from the answer, that the Plaintiffs knew the fact of the transfer four years before the death of the executor: and a considerable time after his death, he having died insolvent, and no person existing to account, the bill is filed to charge the Bank. But for the *acts of Parliament the executor would have to deal with [* 57] this property as any other personal property of the testator. The acts (1) permit the devise of stock; and direct, that no payment shall be made upon such devise till entry in the books of the Bank of so much of the will, as relates to the stock; and that in

(1) 1 Geo. I. st. 2, c. 19, s. 12; 30 Geo. II. c. 19, s. 49.

default of such transfer or devise it shall go to the executors or administrators. This is an attempt under this clause to charge the Bank for the conduct of the devisee for permitting a transfer by a person clearly entitled to transfer. The Bank will not permit a specific legatee of stock to take it without the assent of the executor, nor the executor to transfer to any other person: but where it is specifically bequeathed to any person, that person is the hand, by which it is to be transferred: but the Bank does not meddle with the *cestuys que trust*. The specific legatee is the person, to whom it is to be transferred by the executor; and not the *cestuy que trust*; then the trustee is answerable; and the Bank has nothing to do with it: otherwise the judgment of this Court would be transferred to the Bank. This executor is also specific legatee in trust. If they were different persons, the Bank would have permitted no other transfer than from the executor to the specific legatee, who would have been the owner; and the Bank would have had no title to see to the disposition. They could not ask him a question about it. Stonehouse had therefore a right to transfer as he pleased. He alone was responsible as the trustee of the testator's choice. The object of the bill in the *Bank of England v. Moffatt* was to know, whether the Bank were bound to look farther than to see, that the stock was transferred to the person having the legal interest; and the injunction obtained by the Bank was dissolved. That turned upon the appointment of particular devisees in trust by the testator; in which case the Bank are not trustees. How could the Bank know what interest was due upon the debt to Stonehouse? The Plaintiffs came upon a question of strict right to charge the Bank; and the provisions of the acts must certainly be sufficient to protect them.

Reply. The infant children cannot be affected by the laches of their mother. Where there is no specific bequest, the Bank cannot know, that the executor does not want it for debts, therefore it would be too much to contend, that the executor should [*58] not *have it for the general purposes of the will: but this is clearly specific. Is not the direction of the statutes to enter so much of the will in the books of the Bank to give them notice of the legal and equitable interests? Stonehouse could never have violated his trust without the acquiescence and co-operation of the Bank.

Lord CHANCELLOR [LOUGHBOROUGH]. It is perfectly clear, the Bank must have permitted Stonehouse to transfer into his own name: there could be no possible defence against the desire of him, the legatee of this stock, as far as the legal interest goes; and more than that, having a charge for the payment of his own debt. Were the Bank to enter into the account of that? But his situation as legatee and also executor enabled him by demand and of right to have a transfer into his own name. When it was once got into his own name, he might put it into any name. All the former strictness of practice in the Bank could not have prevented the stock from

being put into the name of Stonehouse: when once put into his name, to which he was distinctly entitled, could the Bank look farther, and inquire, whether the stock standing in his name was trust stock? If so, the Bank would be charged with all the trusts in the kingdom. Then you only rest upon the circumstance of his permitting it to be done by a direct transfer, instead of transferring it into his own name one day and into another the next. It is required for the protection of the Bank against the specific legatee, that that clause of the will shall be fully set forth to the Bank. If that is omitted, it is at the peril of the party; and the Bank transferring to the executor would stand discharged. The consequence would be exceedingly alarming, if in all cases, where there is a legacy in trust, the Bank is to take notice of the execution of the trust. The consequence would be, that for every legacy in trust of stock there must be a bill in Chancery: before there could be any application of that sum, the Bank must be warranted by the decree of the Court. Decree an account of the assets of Stonehouse; and dismiss the bill as against the Bank. Let the 200*l.* stock remaining be transferred to the Accountant General in trust in the cause; the dividends to be paid to the Plaintiff Anne Hartga for her life, with liberty to apply after her death (1).

A DEVISE of stock is in the nature of a parliamentary appointment, and does not want the assent of the executor; if the devisee, therefore, transfer the stock, the Bank is not answerable; for it would be charging the Bank with more duty, in respect of the stocks, than the acts of parliament relative thereto have imposed, if the officers of the Bank were bound to investigate whether there were any equities affecting the devisee's title. *Pearson v. The Bank of England*, 2 Cox, 179. And as the Bank is not bound to require the executor's assent before they permit a specific devisee to transfer stock devised, so, where there is no specific devisee, the Bank cannot refuse to permit the executor to transfer: it would be very dangerous to the Bank if the rule were otherwise; for if the officers of that company, for one purpose, looked beyond the legal title, and took notice of the trusts of the will, they would be bound to take notice throughout; and to stand the consequences of resulting trusts, and such as a Court of Equity might raise. *The Bank of England v. Parsons*, 5 Ves. 660. The Bank cannot, upon an allegation that stock is specifically bequeathed, obtain an injunction against an action brought by the executor, for a transfer of that stock; for supposing the allegation to be true, the executor either cannot maintain the action, and the injunction is unnecessary, or the true construction of the act of parliament does not restrain that action, and if so, there is no equity to be set up against it. *Bank of England v. Lunn*, 15 Ves. 583.

(1) *Post*, *Austin v. The Bank of England*, vol. viii. 522.

WILLIAMS v. CHENEY.

[ROLLS.—1796, FEB. 29.]

SPECIFIC performance of articles to grant a lease to the Plaintiff decreed; though he had contracted to under-let contrary to those articles. (a)

THE bill stated the following case. The Defendant being desirous of disposing of her business of calico glazer and certain premises, the Plaintiff agreed to become the purchaser: and articles of agreement dated the 1st of March, 1783, were entered into, by which, after provisions relating to the lease of the premises, in which the Defendant carried on the said trade, thereby let by her to the Plaintiff with other premises, and the implements of the said trade thereby sold to him, the Defendant farther agreed, that when lease expired of the house in Aldersgate Street, then let to John Ingram, victualler, she would grant lease of same to Plaintiff for remainder of term of years she had therein, wanting eleven days, at the rent, which same was then let at; provided Plaintiff, his executors, administrators or assigns, should request same for the special purpose only of carrying on his or their trade as carried on in the premises that day by her let, or for the special purpose of residence for Plaintiff, his executors, administrators or assigns; such request to be made in writing.

The lease having expired in 1794, the Plaintiff wrote to the Defendant, giving notice, that he meant to accept a lease under the agreement. The Defendant refused to grant him a lease; alleging, that in consequence of an agreement between the Plaintiff and Samuel Whitbread to grant an under-lease of the said house she was not bound to grant a lease; as the Plaintiff did not apply for such lease for carrying on the trade of a calico glazer only or for residence.

The bill charged, that such agreement with Whitbread was not contrary to the spirit of the agreement of 1783; but otherwise it was only conditional; and that the Plaintiff was ready to accept such lease with all reasonable provisos and covenants to confine the use of the premises to the special purpose only of carrying on the trade of calico glazer or of residence for the Plaintiff, his executors, administrators, or assigns. The bill therefore prayed a specific performance of the agreement to grant such lease as aforesaid, with all usual covenants, and such covenants, as may be thought proper and reasonable to confine the use of the premises to the special purpose only of carrying on the trade of a calico glazer or of residence for the Plaintiff, his executors, administrators, or assigns.

The answer admitted the articles, the expiration of the lease, and the notice; and stated, that by articles, dated the 7th of December,

(a) Equity will decree the specific performance of a covenant for a lease, or to renew a lease. 2 Story, Eq. Jur. §722, 728. And the new contract to under-let could not stand in the way.

1792, between the Plaintiff and Samuel Whitbread, the Plaintiff in consideration of 200*l.* paid by Whitbread agreed, that he would on or before the 25th of December, 1794, grant and deliver to Whitbread, his executors, administrators, and assigns, a lease of the said house, called the Nag's Head Ale House in Aldersgate Street, to hold the same premises to Samuel Whitbread, his executors, administrators, and assigns, from the said Christmas 1794, unto the 20th of August, 1810, at the clear yearly rent of 40*l.*; provided, that if the said Thomas Williams, his executors, administrators or assigns, shall not be enabled to grant such lease, and put Samuel Whitbread, his executors, administrators, and assigns, in possession of the said premises for and during the term aforesaid, that in such case and so soon as the said Samuel Whitbread, his executors, administrators, and assigns, shall happen to be obliged to give up possession of the said premises by reason thereof, the said Williams, his executors, and administrators shall immediately refund to Whitbread, his executors, administrators, or assigns, the said sum of 200*l.*; and the Plaintiff covenanted, that he, his executors and administrators, would use his and their best endeavors to obtain a lease from the Defendant in pursuance of the agreement of the 1st of March, 1783. The answer submitted, that the Plaintiff having entered into such agreement, and having requested a lease of the premises for the purpose of re-letting the same according to the terms of such articles, and not for the special purpose only of carrying on the trade of a calico glazer, or for the purpose of residence according to the agreement of 1783, the Defendant was not bound to grant the Plaintiff any lease of the premises.

Mr. *Romilly* and Mr. *Short*, for the Plaintiff, cited *Seers v. Hind*, (*ante*, Vol. I., 259).

Mr. *Lloyd* and Mr. *Steele*, for the Defendant.

These covenants not to assign are as good as any other. The Plaintiff is not entitled to relief contrary to the true spirit of the agreement. The Court must now take it, that by the agreement with Whitbread for the purpose of letting this house to a publican, as it was before, he *has put it out of his power [*61] to perform either alternative of his agreement with the Defendant. Meaning to do neither he does not come here with clean hands. The lease, if it is to be granted, must contain covenants, that will make it immediately void, and will maintain an ejectment.

MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN.] There is no reason why I should hold, that what he has done is at present a forfeiture. The Plaintiff prays performance of a positive agreement. The objection is, that he means to use the premises for another purpose than that, which has been stipulated, and has entered into an agreement, which if executed will not be a fulfilment of the prior contract. But he desires to have it under the conditions agreed on. The word "assigns" seems to have crept in here awkwardly. Mr. Whitbread never meant to be an assign to live there himself; and the most liberal construction is, that whoever took the lease from

him should live in the house ; that either he or the person, who shall stand in his place, shall personally reside. But I have nothing to do with that. The question before me is only, whether a mere covenant, that if he can, he will let Whitbread have the premises, takes away his right to a performance by the Defendant? An agreement to assign would not be a forfeiture of the lease, if granted. If he had actually let a person live in it contrary to his covenant, then it would be a forfeiture (1). I must decree a specific performance. Refer it to the Master to approve a proper lease containing all proper covenants according to the agreement ; and reserve costs.

1. In the principal case, the agreement to underlet was to have a future operation, and then only conditionally ; it would have been difficult, therefore, to construe it as a present forfeiture. But where a plaintiff seeks, by bill in Equity, specific performance of an agreement for a lease praying also that proceedings against him at law may be stopped ; if the answer to his bill establish that the lease he seeks must contain a covenant, which has already been violated, of such a nature that the Court of Chancery would not relieve against the breach ; the proceedings at law will not be stayed, in order to enforce performance of the agreement for a lease, which, when executed, the lessor might determine by an ejectment, brought upon a breach against which no relief could be had ; — as, for instance, parting with the premises, contrary to covenant, without license. *Lowat v. Lord Ranelagh*, 3 V. & B. 29, 31 ; *Sanders v. Pope*, 12 Ves. 292 ; *Davies v. Moreton*, 2 Ch. Ca. 127. A parol license for this purpose is insufficient, unless given as a snare, and under circumstances which amount to fraud. *Roe v. Harrison*, 2 T. R. 430 ; *Richardson v. Evans*, 3 Mad. 218.

2. But though a Court of Equity will not do so fruitless an act as to grant or continue an injunction with a view to a specific performance of an agreement, which might be immediately put an end to by a clause of re-entry, that must necessarily be introduced into the lease sought to be obtained ; (*Wetherall v. Geering*, 12 Ves. 512 ;) the question may be very different when intermediate acts have been done by the lessor, amounting to a waiver of the forfeiture ; if such a case were made out, the lessee might obtain a decree for specific performance, and be protected against the forfeiture at law : (*Gourlay v. The Duke of Somerset*, 1 V. & B. 73 ;) but receipt of rent *alone*, will not amount to a waiver of forfeiture. *Boardman v. Mostyn*, 6 Ves. 472.

3. Of course, an alienation by death causes no forfeiture ; thus, if a lessee has covenanted not to alien, his executors may, in case of his death, dispose of the lease ; for this is an alienation by the act of God, and not that sort of transfer contemplated by the ordinary terms of prohibition. *Seers v. Hind*, 1 Ves. Jun. 295. And it has been long settled at law, that an alienation once made by license, determines the condition, so that no subsequent alienation can give right of entry to the lessor ; *Dumport's case*, 4 Rep. 119 ; *Hitchcock v. Fox*, 1 Roll's Rep. 70 ; which determination, though termed by Lord Eldon an "extraordinary" one, has been followed in Equity : *Brummell v. Macpherson*, 14 Ves. 175 ; *Jones v. Jones*, 12 Ves. 191. But where a lease contains a covenant against using the demised premises as a shop, connivance at the carrying on a particular trade does not amount to a general license to carry on any trade. *Macher v. The Foundling Hospital*, 1 V. & B. 191.

4. A covenant against underletting precludes an assignment ; *Greenaway v. Adams*, 12 Ves. 400 ; but, it seems, the converse does not hold ; *Crusoe v. Bugby*, 2 W. Bla. 767 ; *Boardman v. Mostyn*, 6 V. 471. See, *post*, note 4, to *Donnelli v. Bedford*, 3 V. 149.

(1) *Boardman v. Mostyn*, *post*, vol. vi. 467.

DUKE OF MANCHESTER v. BONHAM.

[1796, MARCH 1.]

LEGACY in trust to pay out of the interest 60*l.* a-year to the testator's wife for life, and the remaining interest during her life to R. Duke of M. and in case of his death to his eldest or only son; and for want of issue male to his eldest or only daughter, for want of such issue female to sink into the residue; and after the death of his wife the testator gave the principal to the said Duke, if then living; but if then dead, to his eldest or only issue male then living; and for want of such issue male to his eldest or only daughter; for want of such issue female to sink into the residue. R. Duke of M. died leaving two sons and a daughter: both the sons died: the eldest left a son, Duke of M. who filed the bill. The Plaintiff is entitled to the surplus interest: but the principal is contingent till the death of the testator's widow.

THOMAS DAY by his will gave the sum of 3000*l.* secured to him by mortgage of a house in Berkley Square and all such other money for principal and interest, as should be due to him therein at *his decease, in trust to pay all such interest money, [*62] as should be then due therein, unto his wife Jane; and by and out of the interest money, which should afterwards from time to time arise and be received from the principal money, to pay to his said wife 60*l.* a year during her natural life half-yearly; and upon trust to pay the remainder of such interest, as should arise and grow due therein during the life of his said wife, "unto his Grace Robert Duke of Manchester, and in case of his death to the eldest or only son of the said Duke, and for want of issue male to the eldest or only daughter of the said Duke; and for want of such issue female such remainder shall sink into the residuum of my personal estate for the person or persons entitled to such residuum by this my will; and from and after the decease of my said wife I give all the money, which shall be then due for principal and interest upon the said mortgage unto the said Duke, if then living; but if then dead, to the eldest or only issue male of the said Duke who shall be then living; and for want or in default of such issue male to the eldest or only daughter of the said Duke; and for want of such issue female the same shall sink into the residuum of my said personal estate for the person or persons, who shall be entitled to such residuum by this my will."

Robert, Duke of Manchester, survived the testator, and died in 1760, leaving issue, George, Duke of Manchester, his eldest son, Lord Charles, and Lady Caroline. His eldest son was his residuary legatee. Lord Charles died in the life of his brother. Lady Caroline married Mr. Herbert. In 1767 the mortgage was paid off, and the money invested in stock. The widow of the testator married Philips. George, Duke of Manchester, died, leaving his Duchess his administratrix.

The bill was filed by the eldest son of Duke George, praying, that the Plaintiff might be declared entitled to the surplus interest and

dividends of the said trust fund, subject to the annuity of 60*l.* to Jane Philips for life, and also that he might be declared entitled to the principal upon her death absolutely.

The Defendants Herbert and his wife claimed in her right: submitting, that by the death of Duke George in the life of the testator's widow Lady Caroline Herbert as only daughter of Duke Robert, his two sons being dead, is become entitled to the

[*63] surplus *interest and dividends, subject to the said annuity, and to the principal of the trust fund after the death of Jane Philips; as the words "for want of issue male" ought to be construed for want of an eldest or only son of Duke Robert.

The Duchess Dowager of Manchester claimed as personal representative of Duke George.

When this cause came on, the Lord Chancellor ordered the personal representative of Duke Robert to be made a party. His personal representative was Lord Brownlow, the executor of the Duke's surviving executor.

Solicitor General [Sir John Mitford] and Mr. King, for the Plaintiff. The person, who framed this will, had not an eye to an estate tail. A daughter is not intended to take, if there should be issue male. It is not to fall into the residue, but for want of issue male and female; though by the first clause it is given only to the eldest or only son or daughter. Upon the second clause nothing was intended to vest during the life of the widow. The Plaintiff, if he survives Jane Philips, will answer the description of eldest or only issue male then living; and the clear intention is, that the surplus interest during her life is to be paid to the person, who, if she was dead, would be absolutely entitled to the principal. That is implied from the direction, that the daughters are to take only for want of issue male. When the question is, whether the word "issue" is to be restrained or "children" to be enlarged, the general intent must be looked to: *Wyth v. Blackman*, 1 Ves. 196, Amb. 555.

Attorney General [Sir John Scott], and Mr. Beavan, for the Defendants, Herbert and his wife. All the cases upon dying without issue furnish this principle; that if the construction can be, that it was intended to be within the allowed period, it shall take effect. In this case all the events are confined to the death of the widow. As to the principal there can be no decree now; for the words "then living," annexed to the gift to the issue male will suspend it till the death of Jane Philips, when Lady Caroline Herbert may be entitled, or her representatives; for the gift to the daughter is not qualified by the words "then living." As to the interest; as the effect of the words "such issue female" would prevent a grand-daughter from taking, it cannot be supposed, that by issue

[*64] male he meant to *describe all male issue. That expression must refer to sons, as the other is confined to daughters. It is a more reasonable construction, that it means such issue, as are in terms the object of the gift, than that it extends to grandsons and great grandsons.

Mr. *Mansfield* and Mr. *Leach*, for the Duchess Dowager of Manchester. There is an absolute gift of the surplus interest to the eldest or only son, which is not directed to cease at his death. The Duchess is entitled, whether it vested in Duke Robert or George. There is no reason, that the plain necessary effect of the words should be varied by the strange disposition in the subsequent part of the will. Upon that the construction, that best answers the general intention, is to give the absolute property to Duke Robert.

Reply. The word "son" may include a grandson; and may even create an estate tail; if necessary to complete the intention to be gathered from other parts of the will. It is clear, the same person is to have the capital and the surplus interest; which in the testator's consideration is attached to the capital.

LORD CHANCELLOR [LOUGHBOROUGH]. The intention can hardly be doubted; though it is very difficult to disentangle it from the words, in which the testator has chosen to wrap it up. He meant, that this legacy of 3000*l.* should vest in a Duke of Manchester. In case there should be no Duke of Manchester, he meant that a daughter, and I think only one daughter, of the then Duke should take it, upon the supposition, that she should be living at that period: but it is very difficult to contend, that it should have gone to any succession of daughters in the female line. Why he should have postponed the vesting except with regard to the 60*l.* a year, I cannot conceive. The point, that embarrassed me, was considering, whether, though it was not his intention, that the interest should vest during the life of Jane Philips, he had not given it in words, that would have given an estate tail, if applied to land, and therefore would have vested it in Duke Robert contrary to the intention, as it turns out in all these cases. In the introductory part of the will he seems to think some retribution due to a Duke of Manchester. According to the true intention and meaning of the testator the present Duke of Manchester is entitled to the surplus interest. Farther than that I cannot declare; for he may not be entitled to the principal. The costs of all parties must come out of the dividends. I cannot diminish the capital.

RUMBOLD v. RUMBOLD.

[1796, MARCH 2, 3.]

TESTATOR devised all the residue of his estates as well copyhold as freehold " (the copyhold part thereof having been previously surrendered to the use of my will) " upon several trusts in favor of his wife and children: the only trust for his eldest son and heir was an annuity of 300*l.* for life; remainder to his wife and children: the testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect, and was not bound by receiving half a year's payment of the annuity, while abroad.

A party bound to elect between two funds, having mortgaged one, elects the other: the former must be taken subject to the mortgage, but shall be reimbursed by the latter, (a) [p. 65.]

Costs, [p. 66.]

The idea of supplying a surrender began after the Statute of Charitable Uses, [p. 69.]

SIR THOMAS RUMBOLD by his will devised the messuage called Walton House with the lands held therewith to his wife for life; and after her decease to his son Anwear Henry Rumbold, if living, in fee: but if he should not survive, unto his son Charles Edmund Rumbold in fee. He also devised all his manor of Woodhall and the capital messuage and lands called the Woodhall estate and all other his estates as well copyhold as freehold, " the copyhold part thereof having been previously surrendered to the use of my will," whereof he was seised in fee simple, except Walton House and the lands before specifically devised, to the use of trustees, their heirs and assigns for ever, upon trust with the consent of his wife and his son Thomas Henry Rumbold during their joint lives and that of the survivor to sell the same, except the next presentation to the living of Walton and Ashton; and he also gave all the leasehold estates, arrears of rent, ready money, securities for money, &c. and all other his personal estate whatsoever not otherwise disposed of, unto the same trustees, their heirs, executors, administrators, and assigns, upon trust to sell and convert into money all such part, as shall not consist of money; and he directed, that his said trustees, their respective heirs, executors, and administrators, should stand possessed

(a) A creditor shall not by his election of the fund, out of which he will receive payment, prejudice the rights to which others are entitled; but they shall either be substituted to his rights, or they may compel him to seek satisfaction out of the fund, to which they cannot resort. 1 Story, Eq. Jur. § 499, and cases cited; *Mayhew v. Crickett*, 2 Swanst. 186; *Miller v. Ord*, 2 Binn. 382; *Cheeseborough v. Millard*, 1 Johns. Ch. 409; *King v. Baldwin*, 2 Johns. Ch. 554; *Haynes v. Ward*, 4 Johns. Ch. 123; *Clason v. Morris*, 10 Johns. 524; *Evertson v. Booth*, 19 Johns. 486; *Averall v. Wade*, Lloyd & Gould, 252. It is often exemplified in cases, where a party, having two funds to resort to for payment of his debt, elects to proceed against one, and thereby disappoints another party, who can resort to that fund only. In such case, the disappointed party is substituted in the place of the electing creditor; or the latter is compelled to resort, in the first instance, to that fund, which will not interfere with the rights of others. *Ibid.* Equity, in affording redress in such cases, does little more than apply the maxim, *Nemo ex alterius detrimento fieri debet locupletior*. *Ibid.* § 558, 559.

of all such moneys, as should arise from the sale of all his freehold, copyhold, and leasehold, estates, and by converting into money his personal estate, and the rents, interest, dividends, and proceeds, to arise therefrom in the mean time, in trust to pay his debts, funeral expenses, annuities, and legacies ; and subject thereto upon several trusts in favor of his wife and children. The only trust in favor of his eldest son was out of the money to arise to invest so much money in the public funds, as should produce the clear yearly sum of 300*l.* ; and to pay and apply the interest and annual proceeds to his eldest son George Berriman Rumbold for life ; and after his decease unto Caroline Rumbold (his wife), if she survived him, and her assigns for life ; and from and after the decease of the survivor to stand possessed of the whole principal for such son of the body of George Berriman Rumbold, as should first attain the age of twenty-one ; and to transfer the same to him with the savings * of the dividends not applied for his maintenance [*66] and education immediately upon his attaining his said age : but if there should not be any son, who should live to attain twenty-one, in trust for the daughter or daughters of George Berriman Rumbold, who shall attain twenty-one or be married, share and share alike ; and the interest in the mean time to be applied for her or their maintenance and education ; and in case he should not have any daughter or daughters, who should attain twenty-one or be married, then to sink into the residue of the testator's personal estate ; the testator directed the residue of the money to arise from the sale of his real estates and the residue of his real and personal estate to be settled upon his son Thomas Henry Rumbold for life with power to jointure ; and after his decease the principal to be paid to such son and daughter or daughters of Thomas Henry Rumbold, as in the will is mentioned ; and if there should not be any such son or daughter, upon the like trusts for his sons Anwaer Henry Rumbold and Charles Edmund Rumbold and their children successively ; and if there should not be any such son or daughter, upon the like trusts for such other son, as the testator might have by his wife Joanna, as should first attain twenty-one ; and if no person should become entitled under the said trusts, then for the testator's daughters born or to be born, equally to be divided between them ; the issue of any dead at the failure of issue of the sons as aforesaid to take the share of their parent ; and failing all such daughters and their issue, in trust for his wife Joanna, her executors or administrators ; with power to George Berriman Rumbold, and Anwaer Henry Rumbold to jointure out of the sums of money directed to be invested for them. The testator appointed his wife and the trustees executors.

The testator's wife, the four sons mentioned in the will, and four daughters, survived him. The testator was entitled to copyhold lands of the value of 60*l.* a-year, holden of the manor of Sacomb, to him and his heirs according to the custom of the manor ; and had no other copyhold estate. He had not surrendered his copyhold estate to the use of the will ; and at the hearing it appeared, he

have regulations made for making the apportionment and dividing the rent; and at last they settled it by a rule of Court. I took it for granted, that something had been conceived to have happened in this Court, that had varied the former decisions upon it. I know, some vague idea was entertained at the time, that the notion of supplying surrenders had received a little attack.

March 3d. Lord CHANCELLOR. The question is, only whether Sir Thomas Rumbold meant to devise this estate. It is not a question, whether the Court is to supply a surrender. The interpretation for the heir cannot possibly be consistent with the words. What is contended for him is, that the testator had reference to a future surrender. The words negative the conclusion, that he meant to surrender. They intimate distinctly, that he supposed himself to have previously surrendered. That he had not done. It is nothing more than a mistaken description. The copyhold is not so good a thing as the annuity. I must make the decree conditional, that he was bound to elect (1), and if he takes the annuity, that then the trustees of the will must pay off the mortgage, and apply to retain the money arising from the annuity, that is in their hands; and let the heir be allowed the fines, he has paid upon admittance. All the costs must come out of the estate.

I looked last night into Duke's Charitable Uses. It is clear, the idea of supplying the want of a surrender began after the Statute of Charitable uses (2). In one of the cases there is a [*70] strange *determination, that I think could not be law now.

It was before Sir Nicholas Bacon, Lord Keeper; who confirmed the decree of the Commissioners of Charitable Uses. A person seised of lands *in capite* devised the whole estate; which was also an estate in tail in him. He gave an estate for life, and a remainder upon that estate for life to the charity. The determination was, that the whole land, though it was held *in capite*, and only two parts devisable, passed by his will; that the estate tail was barred by the devise to the charitable use; that the particular estate could not take effect; but the remainder to the charity was good. It was contrary to every principle (2).

THAT a surrender to the use of the testator's will is not, now, necessary to effectuate his testamentary disposition of copyholds: see, *ante*, note 4 to *Crockett v. Dolby*, 3 V. 10.

(1) Upon the doctrine of election, see the notes, *ante*, vol. i. 523, 7.

(2) 43 Eliz. c. 4.

(3) *Post*, *Wilson v. Mount*, 191; *Pettisward v. Prescott*, vol. vii. 541; *Blunt v. Chithrow*, x. 589, and the note p. 591.

FELLS v. READ.

[1796, MARCH 7.]

THE Court will decree a specific chattel to be delivered up without measuring the value, where from its nature there can be no compensation by damages. In this instance the Defendant retained possession after the expiration of a limited time, for which he had received it upon a special trust and an express engagement to restore; and an action, which had been brought, was rendered ineffectual by the release of two of the owners, combining with the Defendant. (a)
Costs, [p. 73.]

THE Plaintiffs were members of a club, called "The Past Overseers of St. Margaret's Parish, Westminster," which consisted of persons, who had served the office of Overseer of the poor of that parish. This society had been for a long period in possession of a silver tobacco-box inclosed in two large silver cases, all of which were adorned with several engravings of public transactions and heads of distinguished persons. The date of the box did not appear in the cause: but the ornaments, which had been added by different overseers during the time the box and cases remained in their custody, began in the year 1713. This box and the cases were always kept by the overseer for the time being; who upon coming into office received them from the churchwarden with a particular charge, in which he was enjoined, under a penalty, to produce them at all meetings of the society, and to deliver them up on going out of office to the senior churchwarden, to be by him delivered to the succeeding overseer. They were delivered in the usual form to the Defendant Read, on his coming into office as overseer. On going out of office he refused to deliver them up, unless the vestry would pass his accounts; in which they had refused to allow him certain payments. Upon this a meeting was called; and it was resolved by those members, who attended, that legal steps should be taken; and after some negotiation an action was brought; and Read was arrested. Hanley and Byfield, two of the members, in whose name the action was brought, executed a release to Read; who *delivered the box and cases to Hanley. An [* 71] application was made to Mr. Justice Buller at chambers to set aside the release: but that application failed. The bill was then filed against Read, Hanley, and Byfield, to have the box and cases delivered up. They were ordered to be placed in the custody of Master Leeds.

(a) In cases of personal chattels, in which the remedy at law by damages would be utterly inadequate, and leave the injured party in a state of irremediable loss, Equity will interfere, and grant full relief, by requiring a specific delivery of the thing, which is wrongfully withheld. This may occur where the thing is of peculiar value, as being ancient, or the production of some distinguished artist, or a family relic, or ornament. See 2 Story, Eq. Jur. § 709, 906, and English cases cited; *Osborn v. Bank of U. States*, 9 Wheaton, 845. But in ordinary cases, which concern personal chattels and ground merely in damages, the remedy is at law only, and chancery will not interfere. *Hardwick v. Forbes*, 1 Bibb. 212.

It was proved by Carteret, that the box and cases were delivered to Read under the usual injunctions and conditions: to which he expressly consented. The Defendants, Hanley and Byfield insisted, that the action was commenced without their authority. They did not attend the meeting: but it was regularly called.

Mr. *Mansfield* and Mr. *Cox*, for the Plaintiffs, cited *The Duke of Somerset v. Cookson*, 3 P. Wms. 389, as having established the jurisdiction, where the thing, of which the delivery is sought, is of such a sort, that damages can be no compensation.

Attorney General [Sir *John Scott*], for the Defendants. Except that case and *Pusey v. Pusey*, 1 Vern. 273, in which the chattel had a connection with the tenure of the land, there is no case like this. The Court will order title-deeds and heir-looms to be delivered up, and will not permit valuable things to be defaced: but except in those cases there is no instance of a decree specifically to deliver up a specific chattel. If from a complication of circumstances they cannot succeed at law by stress of damages to compel delivery, I do not say, this Court will not interfere. There was a special property in the person, to whom this box was to be delivered, that would have supported an action; or they might have expelled Hanley and Byfield, and have gone on at law (1).

LORD CHANCELLOR [LOUGHBOROUGH]. I am sorry this cause has come into this Court: but the regret I feel is no other than that, one always feels, that litigation and expense should have been occasioned by the peevishness and obstinacy of the parties. The value I cannot measure. The *Pusey horn*, the *Patera* of the Duke of Somerset, were things of that sort of value, that a jury might not give two-pence beyond the weight. It was not to be cast to the estimation of people, who have not those feelings. In all cases, where the object of the suit is not liable to a compensation by damages, it would be strange, if the law of this country did not afford any remedy. It would be great injustice, if an individual [* 72] cannot * have his property without being liable to the estimate of people, who have not his feelings upon it. But this has very particular circumstances: for if no such cases as those cited had occurred, if this had come here originally, it is impossible, that I should not have permitted the suit to stand. In the case of the *Pusey horn* in *Vernon* it does not appear, how the Defendant got it.

In the case of the Duke of Somerset the *Patera* was in the possession of a goldsmith, who bought it in the way of trade with notice of the claim of the Duke of Somerset. But in this case the possession is by a qualified title. It was delivered upon an express trust to keep it and produce it at the meetings of the club, and at the expiration of his office to deliver it over to the senior churchwarden, in order that he might give it to the next overseer. He accepts it upon that condition. The witness Carteret states his ex-

(1) *Post*, vol. x. 163, Lord Eldon, C. said, the objection in this case, to which no answer was given, was, who were the *cestuis que trust*?

press assent to the conditions. Had he then any right to retain this possession against the terms, upon which it was delivered to him? He was a depositary upon an express trust; and he does not perform the trust. Upon the common ground of equity there was a right in the Plaintiffs to have called upon him, in the first place during the term to have used it according to the trust. That would be a small subject of a suit in equity: but if he had not produced it at the meeting, I must have compelled it; so, if he retains it after the expiration of the term, I must compel him to use it according to the trust. There was a legal remedy; and I think, it was done very wisely not to begin in Equity. There was another remedy, which did not occur to them. Upon the terms of Carteret's evidence the person, to whom Read was bound at the time to deliver it, might have been Plaintiff *assumpsit*. The conduct of these Defendants is perfectly groundless: the idea, that by keeping possession of this ornament he would compel the vestry to allow his accounts. As to Hanley and Byfield, it is not necessary for me to determine it, but I incline to think, they would be bound to let the others make use of their names: but an indemnity as to the costs was the utmost they could have been entitled to. It is unfortunate, that the application made to the Court of Law did not succeed to set aside the release. I am then to judge of the conduct of the parties, not with regard to the ground of the decree, but upon the nature of the possession coupled with a trust. There was a proper ground as much as in any case. Where the right is not to use the thing as his own, but coupled with a trust to deliver it at a certain *time, there is a clear [* 73] jurisdiction upon the ordinary Equity to compel the execution of the trust by the delivery of the thing at the time. But the conduct was extremely bad in Read; and not better in those, who conspired with him to frustrate the purpose of the trust and act contrary to it.

Declare the Plaintiffs entitled to the possession of this box. Let them receive it from the master's office. Let all the Defendants pay the costs; and let the Defendant Read pay the costs at law (1).

A court of Equity will interpose to protect the enjoyment of a specific chattel, not only when the right is disputed between man and man, (*Louther v. Louther*, 13 Ves. 95,) but even where the jurisdiction (now established) might have originally been more questionable;—that is, when the suit is preferred on behalf of an association which is not incorporated. In such a case, certain individuals of that body may be permitted to sue, as representing the rest, when it would be inconvenient to the administration of justice if the whole number were made parties. The plaintiffs, however, must not describe themselves as corporators, but merely as individuals representing a joint interest. *Lloyd v. Loaring*, 6 Ves. 779; *Lady Arundel v. Phipps*, 10 Ves. 148; *Meur v. Malby*, 2 Swanst. 262; *Cockburn v. Thompson*, 16 Ves. 328.

(1) See 1 Fonb. Tr. Eq. 31; *Earl of Macclesfield v. Davis*, 3 Ves. & Bea. 16; *Wiley v. Cottle*, *Adderley v. Dixon*, 1 Sim. & Stu. 174, 607.

WORDSWORTH v. YOUNGER.

[1796, MARCH 7.]

CONTINGENT legacy out of real and personal estate payable two years after the event: by codicil the testator reciting, that he found his estate would not bear that payment during the life of A., being chargeable with an annuity for her life, declared, he revoked that part of his will, and that the said legacy upon the same event was to be paid twelve months next after the death of A. and not before. A. dying before the contingent event, the legacy is not payable till the expiration of the two years after it. (a)

HENRY LITLEDALE by his will, dated the 11th of April, 1779, devised and bequeathed all the rest of his real and personal estate to trustees and the survivor, his heirs, executors, administrators and assigns, upon trust to advance to his wife such sums, as she should think necessary for the maintenance of herself and family and for the maintenance and education of his two children Anne and Catherine, while under age; and when his said children should attain their ages of twenty-one years or marry, then to pay to each of them one full third part of all his said personal estate, and the other third part to his wife; and if both his children should happen to die under age and unmarried and without issue, he gave and bequeathed to his sister Catherine Little-dale 3000*l.* to be paid her at the end of two years after the death of the survivor of his said children as aforesaid.

The following day the testator made a codicil containing this clause:—

“Whereas since making the annexed will I found, that my estate would not bear the payment of the 3000*l.* to my sister during the life of my mother-in-law, as it is chargeable with the payment of 120*l.* to her during life; therefore I revoke that part of the will; and in case my two dear children should happen to die under age, unmarried, and without issue, then the said 3000*l.* is to be paid twelve months next after the death of my mother-in-law, and not before.”

Upon the marriage of the testator's sister Catherine Little-dale with John Gale her interest in this legacy of 3000*l.* was settled in trust, in default of her appointment to pay the interest to her husband [* 74] for life, and after his decease to pay the principal to their children. Catherine Gale died in 1783. Eleanor Little-dale, mother-in-law of the testator, died in 1786. Catherine Little-dale, the younger daughter of the testator, died in 1793. His eldest daughter Anne died upon the 11th of March, 1794. They both died unmarried and without issue. The bill was filed by the trustees under the marriage settlement of John and Catherine Gale and their infant son by his father as next friend; and the question was, whether the legacy of 3000*l.* was payable immediately upon the death of the surviving daughter of the testator, or not till the expiration of two years after that event.

(a) See Roper, *Legacies*, by White, 587, chap. 14 § 2.

Solicitor General [Sir John Mitford], Mr. Stanley, and Mr. Thomson, for the Plaintiffs. The codicil makes no alteration except by farther postponing the payment.

LORD CHANCELLOR [LOUGHBOROUGH]. The testator has clearly expressed his intention to postpone the payment. He reasons distinctly by his will; taking notice of the inconvenience, that would arise in the life of his mother-in-law; and revokes what? That direction, by which it became payable in the life-time of his mother-in-law. In no event it shall be payable, while she is living. He refers back to the contingency in the will; and puts a new term upon it. There is a little ambiguity in it. Declare, that the legacy is payable with interest from the 11th of the present month of March to the trustees of the settlement. The costs must come out of the estate.

WHEN the substantive, direct object of a codicil is not to revoke, but such revocation is intended merely as an incidental and necessary part of the testator's ultimate object; it is only by reference to such final purpose that the codicil can be rightly understood. *Ex parte The Earl of Ilchester*, 7 Ves. 377.

MASTER v. KIRTON.

[1796, MARCH 14.]

BILL by a partner under a parol agreement charging misconduct in the other partner, and praying a dissolution, account and injunction from executing securities in the name of the firm: demurrer to the prayer for a dissolution, because there was no writing between them, overruled, (a)

THE bill stated the following case. The Plaintiff and Defendant were bankers in partnership: but no agreement in writing had been entered into. The Defendant introduced Newnham, a friend of his, to keep cash with them; and contrary to the opinion and desire and without the consent of the other partner permitted him to draw upon the partnership; and directed his bills to be paid out of the joint property; by which he became considerably indebted to the partnership. Newnham executed bonds to the Defendant only. A balance of above 5000*l.* remains due from Newnham, with *respect to which he referred the Plaintiff to the Defendant; [* 75] who said, the bank had no demand against Newnham.

The bill prayed, that the partnership between the Plaintiff and the Defendant might be dissolved, an account, and division of the partnership effects, and payment of the balance, if any should be

(a) There seems to be no reason why the right of a partner to the protection of a Court of Equity should depend upon the existence of written articles of co-partnership. See Story, *Partnership*, § 187, 227, 269.

due, to the Plaintiff upon the account; and that the Defendant might be restrained from executing bonds, notes, or any other securities in the name of the firm, without the consent of the Plaintiff.

The Defendant demurred to so much of the bill, as prayed the dissolution of the partnership.

Mr. *Grant*, for the Demurrer. This partnership existing only by the fact of their acting together, the prayer, that the Court may do what they have a right to do for themselves, is idle and nugatory. In the case of a tenant by sufferance a demurrer will lie; for notice to quit may be given.

Lord CHANCELLOR [LOUGHBOROUGH]. There is no color for this demurrer. How is the Plaintiff to have the account taken? How is he to restrain the Defendant from using the partnership name and receiving the partnership debts? Over-rule the demurrer.

On the 22d of March, 1797, the MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN] sitting for the Lord Chancellor, decreed a dissolution of the partnership; though the Counsel for the Defendant contended against such a decree upon the same ground as was taken on the argument of the demurrer (1).

1. THE rule, that a tenancy at will may be terminated at any time, does not imply that matters, which during the tenancy remained a common interest between the parties, are not to be wound up after their relation has ceased in other respects. So, in the absence of express contract, a partnership may be determined whenever either party thinks proper; but not in this sense, — that there is an end of the whole concern. All the subsisting engagements must be duly closed; for that purpose they remain with a joint interest, though they cannot enter into new engagements. *Peacock v. Peacock*, 16 Ves. 57; *Crawshay v. Collins*, 15 Ves. 227; *Wilson v. Greenwood*, 1 Swanst. 480.

2. Equity does not interfere, where one partner has violated a particular covenant, but the other does not choose to dissolve the partnership; for if that jurisdiction were entertained, there might be a separate suit and injunction in respect of each covenant; and the Court might have to see, from time to time, that the partnership was properly conducted. *Marshall v. Colman*, 2 Jac. & Walk. 268. A Court of Equity, no doubt, has power to restrain and enjoin partners, and that for the very purpose of preventing repeated actions of covenant: *Waters v. Taylor*, 2 V. & B. 302: and one partner may file a bill against his co-partner for an account, without praying a dissolution of the partnership; *Harrison v. Armitage*, 4 Mad. 143; but if he proceeds to ask not merely an account, but an injunction, and an interim regulation of the management of the concern, even by payment of the moneys into Court, yet, desiring the partnership to be continued, his application will not succeed. *Ferman v. Homfray*, 2 V. & B. 329. Where the Court is asked to take the management of a partnership concern into its own hands, and to appoint a receiver, this will only be done for the purpose of winding up the concern conclusively: *Waters v. Taylor*, 15 Ves. 25; *Crawshay v. Maule*, 1 Swanst. 507: in order to obtain which decisive interference, breach of contract, or abuse of trust, must be fully established. *Carlen v. Drury*, 1 V. & B. 158. A receiver will not be appointed because ground may, possibly, be shown to authorize that appointment: when a partner has acted improperly, a Court of Equity may think fit to restrain him from doing certain acts in future; but where the other party does not desire a dissolution of the partnership, the Court will not appoint a receiver; or it might in such a way, make itself the manager of every trade in the kingdom. *Goodman v. Whitcombe*, 1 Jac. & Walk. 592, 594. See, *post*, the note to *Hartz v. Schrader*, 8 V. 317.

(1) See Watson on Partnership, 360, 1.

FRANCO v. FRANCO.

[1796, MARCH 15.]

BILL by one trustee of stock against the other to compel him to replace it or give security according to his engagement, when the Plaintiff joined in transferring the stock into his name: demurrer, because the *cestuis que trust* were not parties, overruled with costs. (a)

THE bill stated the following case. Jacob De Moses Franco by his will gave to his son Raphael 1000*l.* in trust for Jacob, son of Raphael, and as many other sums of 500*l.* each, as he should have other children at the testator's decease except Jacob, to be paid to them respectively at the age of twenty-five or marriage, with benefit of survivorship in case of the death of any before the time of payment. The testator appointed his said son Raphael and his grandson Jacob, son of his eldest son Moses, executors, and in case of the death of either of them he appointed Francis Franco, the Plaintiff, to be one of his executors in the place of him dying. At the death of the testator Raphael had ten children. The executors invested 5500*l.* in 5 per cent. Bank annuities in their joint names upon the trusts of the will for the *children of Raphael. [*76] Both of the executors died: Jacob in 1782: Raphael in 1784. Raphael appointed the Plaintiff Francis Franco, the Defendant Jacob Franco, and two other persons, his executors. All the remainder of the fund was transferred into the names of the Plaintiff and Defendant upon the trust of the will of Jacob De Moses Franco; of which will the Plaintiff upon the death of the surviving executor obtained probate. Seven of the children of Raphael having attained the age of twenty-five, their shares were transferred to them. In September, 1793, 3000*l.* 5 per cent. Bank Annuities remained for the three remaining children, who had not attained the age of twenty-five. At that time the Defendant prevailed upon the Plaintiff to permit the fund to be transferred from their joint names into the name of the Defendant only; in order that he might sell the same; assuring him, it was only for a temporary accommodation, and he would very soon replace it; and he also proposed for absolutely securing the repayment, to surrender a copyhold, and to procure the Plaintiff to be admitted, and also to convey other estates; upon which the transfer was made; and the Defendant sold the stock, received the produce, and never replaced it.

The bill prayed a discovery and account; that the Defendant

(a) In the present case the *cestuis que trust* could found no right on the engagement between the two trustees, as they had no privity with it. Story, Eq. Pl. § 213; Calvert on Parties, ch. 1, § 1, 7, 8. If a trustee has fraudulently or improperly parted with trust property, the *cestui que trust* may proceed against the trustee alone, to compel satisfaction for the breach of trust, or he may at his election join the assignee also, if he were a party to the fraud, or if he seeks redress against him. *Bailey v. Ingles*, 2 Faige, 278; *West v. Randall*, 2 Mason, 197.

should be decreed to replace the fund, or to surrender the copyhold estate, and that the Plaintiff might sell the same, and that the Defendant should be decreed to make good the deficiency.

The Defendant demurred on the ground, that the three children of Raphael, the *cestuis que trust*, were not parties.

For the Demurrer. The rule, that all persons interested must be parties, is invariable, except in the case of creditors and legatees; who by particular indulgence are permitted to go on before the Master. These children have the very same equity as the trustees. They might file a bill for the same purpose, and pray the same specific relief. The rule is, that the Court will not entertain a suit on behalf of a trustee without having the *cestui que trust* before the Court. *Hanne v. Stevens*, 1 Vern. 110.

LORD CHANCELLOR [LOUGHBOROUGH]. That was a suit for the execution of the trust. This is no bill for execution of the trust.

Whatever demand the *cestuis que trust* would have, they [*77] could never found * themselves upon the case the present

Plaintiff makes against the Defendant. The demurrer ought to be over-ruled, and with costs; and I cannot help marking in strong terms my disapprobation of such a demurrer: which can be put in only for delay, and to cover a person guilty of a breach of trust, and to defer the time, at which he ought to answer.

WHEN a bill is brought by a trustee for specific performance of an agreement in which the trust originates, no doubt, the *cestui que trust* ought to be a party to the suit; otherwise he would not be at all bound by the dismissal of that bill, and the defendant might be vexatiously harassed by another suit on the very same grounds which had previously been declared untenable. *Kirk v. Clark*, Prec. in Cha. 275. But this reason was obviously inapplicable to the principal case, in which the bill was brought by the trustee, not to carry the trust into execution, but solely to relieve himself from that responsibility which he had incurred by imprudently accommodating his co-trustee; as to that liability, see, *ante*, the notes to *Balchen v. Scott*, 2 V. 678.

ATTORNEY GENERAL v. THE MARQUIS OF STAFFORD.

[1795, Nov. 16, 17; 1796, MARCH 16, 18.]

UNDER a commission of charitable uses it was agreed, that copyhold lands, formerly surrendered for maintenance of a minister in W. chapel, should be let, and the rents employed towards maintenance of the minister, to be chosen and appointed by the inhabitants, and presented and allowed by the lord of the manor; who upon complaint might give the minister half a year's warning, and if he had not reformed by that time, might remove him: the information prayed, that the lord might be decreed to allow and approve the candidate, who had the majority of votes; which was refused on the ground of misconduct; and, the evidence clearly proving it, a new election was directed; upon which the same candidate being returned, and producing strong affidavits of good conduct, for the last six years, the decree, stating the affidavits, declared, that in consequence of them the relator deserved the approbation of the trustees. Qualities of a donative, [p. 80.]

BEFORE the 43d year of the reign of Queen Elizabeth, certain copyhold lands and premises holden of the manor of Stowheath were surrendered to trustees upon trust, that the yearly profits should be employed for the hire, stipend, and wages, of a priest, minister or curate, to say divine service in the chapel of Willenhall from time to time for ever. About the sixth year of the reign of King James I. a memorandum was entered on the rolls of the said manor reciting, that by a consideration awarded upon the statute 43 Eliz. under a commission of charitable uses the inhabitants and men of Willenhall in the county of Stafford have made profert, that certain copyhold lands in the town of Willenhall, holden by copy of court roll of the manor of Stowheath, were formerly surrendered upon trust, that the yearly profits should be employed in the hire, stipend, and wages, of a priest, minister or curate, to say divine service in the chapel of Willenhall from time to time for ever, for the ease of the inhabitants there dwelling, being two miles from Wolverhampton, their parish church, and towards repairing the said chapel; and the said yearly profits were so employed for many years; upon consideration of which cause, ambiguity and doubtings arising, whether the said lands were originally given to the maintenance of a chantery priest, or otherwise to the maintenance of a curate or priest to say divine service, the said inhabitants are contented to refer themselves therein to the consideration of Sir John Leveson, Knt. and John Giffard, Esq. lords of the manor of Stowheath, within which manor the said town of Willenhall lieth; which employment of the rents and profits the said Sir John Leveson and John Giffard accepting, the rather *for that their ancestors have formerly given allow- [* 78]

ance out of the same lands to the same purpose, agree, that the said lands shall forever hereafter be let by the consent of four of the inhabitants of the said town of Willenhall, to be chosen by the greater part of the sufficient householders of the same town, and that the rents to be reserved shall be employed half yearly, sub-

ject to the ancient chief rent due to the lords of the manor and an annual payment toward repairs of the chapel, towards the maintenance of a stipendiary priest, minister, or curate, for the saying of divine service, ministering the sacrament, &c. in the chapel : which priest &c. shall be from time to time chosen, nominated, and appointed, by the said inhabitants of Willenhall for the time being, or the greater part of them, having lands as aforesaid, and presented or allowed by the lord or lords of the said manor of Stowheath and his or their heirs or heir for ever : and it is farther ordered, that whatsoever shall be appointed, presented, or allowed, as aforesaid, to supply the place of minister or curate in the said chapel, shall conform himself to the government ecclesiastical, &c. and be resident upon his cure there ; in default thereof and upon complaint made by the said inhabitants or the greater part of the sufficient or chiefest of them either of his non-residence, insufficiency, negligence, or any other misdemeanour, to the lord or lords of the said manor for the time being, it shall be lawful for the lord or lords of the said manor for the time being to give one half year's warning to the said priest, minister, or curate, to reform himself ; which if he do not, then it shall be lawful for the said lord or lords for the time being to remove or displace him at the end of the said half year, and to present and allow another curate, minister, or priest, there to be nominated and appointed by the said inhabitants or the greater part of them as aforesaid. It was then ordered, that the lands should be granted to nine feoffees, then and there to be nominated, upon which grant 13*l.* 6*s.* 8*d.* should be paid for a fine and heriot ; and that after the death of six or seven, there should be six or seven others from time to time chosen by the said inhabitants or the greater part of them, and that the old grant should be surrendered, and a new grant made ; and that upon every such admittance there should be paid to the lords of the said manor 6*l.* 13*s.* 4*d.* for a fine and a heriot.

Upon the 23d of December, 1788, the chapel of Willenhall became vacant by the death of Titus Neave. Two candidates offered themselves ; and an election took place on the 11th of May, [* 79] 1789, *and the numbers upon the poll were 67 to 29 ; which was certified to the Marquis of Stafford and Thomas Giffard, Esq. lords of the manor, in the usual way ; but they declined to appoint the candidate, who had the majority of votes. Upon that the information and bill was filed against the lords of the manor, the bishop of Norwich, as Dean of Windsor and Wolverhampton, Christopher Marshall, as official to the said dean, and Thomas Walker, as surrogate ; praying, that it might be declared, that the Plaintiff had been duly elected, nominated, and appointed, to the place of minister, &c. of the said chapel, and was entitled and ought to be approved and allowed by the Defendants the Marquis of Stafford and Thomas Giffard, as the proper person to be licensed to perform the duties ; and that the said Defendants might allow and approve the said Plaintiff accordingly, and be restrained from presenting to be licensed, and that the other Defendants might be

restrained from licensing any other person; and that the marquis of Stafford and Thomas Giffard might be decreed to be trustees only for the inhabitants of Willenhall, having lands of inheritance and being householders dwelling there, in respect of the right of approval vested in them; and that the charitable purpose intended by the erection of the chapel and appointment of a minister might be observed according to the original institution.

The information stated, that the chapel of Willenhall was a chapel of ease to the royal free chapel and parish church of Wolverhampton and within the ordinary jurisdiction of the dean of the king's free chapel of St. George, Windsor, and of the king's free chapel of Windsor and Wolverhampton. The lords of the manor by their answers stated, that the said chapel was a free chapel founded and originally endowed by the lords or lord of the manor of Stowheath before time of memory, and always was and is a pure donative, and was never augmented by Queen Anne's bounty, and therefore is not subject to any ecclesiastical jurisdiction. They submitted, that the lords of the manor had a clear right, and were bound to reject any person, however recommended, if for any reason unfit for the office of minister. They stated their reasons for refusing to appoint the Plaintiff on account of his improper conduct as a clergyman, and that 49 of the persons, who voted for him, were not inhabitants of the town of Willenhall, but resided in several distant and detached places of the hamlet of Willenhall, and that four only of the voters for Mr. Haydn, the other candidate, were liable to that * objection; and that 43 of the voters for the former voted [* 80] in right of cottages and encroachments upon the lord's waste, and are in very poor and indigent circumstances; that Haydn, the other candidate, is a fit and proper person; and the 29 voters for him voted in right of undoubted lands of inheritance. They therefore submitted, whether the right is in the sufficient householders resident in the town of Willenhall having lands of inheritance, or in the hamlet at large having also lands of inheritance; and if in the latter, whether the said 43 persons are entitled to vote; and they submitted to act as the Court should direct.

In one of the instruments of appointment by the lords of the manor, that was proved in the cause, the language was, that approving the choice they present, constitute and allow, &c.

There was strong evidence of misconduct by the Plaintiff, while he was officiating curate for Mr. Neave, the last minister; who told him, he should be obliged to remove him.

The *Attorney General* [Sir John Scott] and Mr. *Stratford*, for the Plaintiff, contended, that where there is a right to nominate to those who are to present, the nomination is the substance, and the presentation only ministerial. *Burn Ecc. Law*, tit. Benefice, 97; and *Shirley v. Underhill*, M. 16 James I. there cited.

The *Solicitor General* [Sir John Mitford], Mr. *Graham*, and Mr. *Richards* for the Defendants, insisted, that it was a donative; and the power in the lords of the manor to remove the minister showed that.

Lord CHANCELLOR [LOUGHBOROUGH]. This information is brought upon an establishment in nature of a donative; as to which the person, in whom the right to appoint is, appoints at his own discretion. He does not present. It is true, the person appointed must be a clergyman, and licensed to preach and administer the sacrament. He is a mere chaplain, and holds at will. The person appointing removes him at his will and pleasure, and gives no account of his reasons. Whatever is the nature of the land, (there seems to have been some dispute, whether it was not appropriated to some chantery) it was clearly in that situation, when the inhabitants submitted themselves to have the land regulated according to the pleasure of the two lords of the manor. The consequence of the [*81] transaction *that passed then, seems to be this: the appointment and the regulation of it is in some degree divided between the majority of sufficient householders having estates of inheritance in the township of Willenhall and the two lords of the manor: and it is clear from this instrument, particularly the clause reserving the power of removal, that the lords of the manor must be construed according to the words to have a discretionary power to a certain extent vested in them. Whatever power to nominate they might have had, they have given it up so far, that the inhabitants have a right to elect a person, whom the lords of the manor agree to present and allow. It is provided, that upon complaint made of the minister by the majority of the inhabitants to the lords of the manor they are to give him six months notice; and if he does not reform within that time, they may remove him. As to that they have a manifest discretion. They cannot without complaint remove: but upon that they must have a judgment. It is distinctly reserved to them. They are to judge, whether he has reformed. As they have a discretion as to a minister already appointed, I cannot fail to give the same construction to the words, where they are to present and allow. I think the division very fair between the parties. It is not enough to say, that if an improper person is nominated, the ordinary may withhold the license. It is not for the lords of the manor to nominate that person; to give him the sanction of their allowance. The language of the appointment is, that approving the choice they present, constitute, and allow. There is not much control reserved to them, but still there is a degree of it both in the instrument of appointment and afterwards; which makes it very different from a mere donative. It differs materially from *Shirley v. Underhill*: there is more reserved to the lords in this case. I am particularly to consider, that the lands originally belonged to some charitable use. It is the execution of a trust for public and charitable purposes, to be sought in this Court.

The lords of the manor therefore have a discretion; and upon the evidence they have exercised it very properly. It appears distinctly from the evidence, that this person's general course and habit of life was neither sober, orderly, nor peaceable; and if the inter-

rogatory had been put to the witnesses produced by him, I doubt much, whether they would have answered negatively to these points; whether he was not frequently intoxicated, disorderly, and quarrelsome: for their evidence is thus qualified: "for any thing they know *to the contrary." All the evidence, that [* 82] affects his character, goes to his conduct, when he was officiating curate to Mr. Neave; who told him, he should be obliged to remove him; and after that he did no public duty on Sunday. Under these circumstances I cannot establish so much of the prayer of the information as seeks to compel the Defendants to approve and allow the relator: I cannot establish the right of the other gentleman; and must upon the rest of the prayer order the inhabitants to proceed to a new election.

The decree was, that the bill as against the Bishop of Norwich, Marshall, and Walker, should be dismissed with costs: that so much of the bill, as seeks to compel the Marquis of Stafford and Mr. Giffard to allow and approve the Plaintiff — as a proper person to be licensed to perform the duty of priest, minister or curate, of the chapel of Willenhall, should be also dismissed; and it was ordered that the inhabitants, being sufficient householders and having lands of inheritance, whether freehold or copyhold, within the township of Willenhall, should proceed to a new election of a minister, to be by them nominated to the Defendants Lord Stafford and Thomas Giffard, lords of the manor, for their allowance and approbation; and that the poll should be taken by the steward of the manor at such time within a month as he should appoint, giving a week's notice. An inquiry was directed, who is the heir at law of the surviving feoffee of the charity, in whom the same is vested, and who has been in possession of the estate and has let the same, and from whom the rents are to come; and costs and farther directions were reserved:

March 16th. This cause came on for farther directions. Another election had taken place; upon which the same candidates again offered themselves; and the relator was elected by a considerable majority; the votes being 55 to 23. The Marquis of Stafford and Mr. Giffard still declined to appoint the relator.

Affidavits of six neighboring clergymen were read, stating the propriety of the relator's conduct in performing the duty of minister of the chapel for the last six years, and also in performing the duty of two clergymen upon their occasional absence.

LORD CHANCELLOR [LOUGHBOROUGH]. I think the trustees have acted throughout with the most perfect propriety. They had according to my conception of the nature of this establishment a very ample discretion reposed in them; much more, I agree with the Solicitor General, than the bishop has, where he is to judge of the character of a clergyman in order to grant a license. When the election was made in 1789, upon which this information is founded, notice was given to the trustees of the objections taken to this gentleman. They upon that withheld their approbation. That

produced the information ; and they were called upon to state their reasons for withholding their approbation, and to give it. The examination, that took place upon that, satisfied me, that they had done their duty, and were well grounded, according to the evidence, of the irregularity of his conduct, in disapproving of him as a clergyman. What has intervened since? I directed the inhabitants to proceed to a new election, describing their qualification, upon which there was some dispute : but nothing turned upon that. A new election took place. Suppose the inhabitants had acquiesced, and another election had taken place, and within six years a vacancy had happened, and the relator had been elected, and that his conduct had been so reformed as to have effaced a little his former irregularities. The case would have been very different from that election. There is not a great deal of difference between that case and the present. The irregularity imputed to him was to the general cast and habit of his life. There was no objection, I think, to his learning. It is hard to say, there shall be no retrieving a character, that has been slurred, by a future good conduct, and persevering for a considerable time in such a course, as may recover in some degree the habit, he has lost. ' The trustees certainly acted with great propriety in referring it back to me to form a judgment for them, which they could not form for themselves upon a matter, that lay in evidence, and upon which a great deal of evidence was heard. It would be strong, if I was acting as a private trustee, but much more sitting here, if I was to say, no regard was to be paid to the testimony, first of the inhabitants. I could not hold, that a clergyman in possession of his orders and not under any ecclesiastical disability was incapable of being elected. But he went under all possible disadvantages to a new election ; the impression of all the evidence, that had been given against him, and the effect it had had to set aside the former election. Notwithstanding that, 55 to 23 of the inhabitants gave their testimony in his favor by [*84] again electing him. There may be *party and obstinacy in it : but there may be also a satisfaction in their minds, that they were supporting the character of a man, who had retrieved his character by a more regular course of life. According to the account given he had sense enough to conduct himself well, if he had resolution to keep himself sober. In addition to this he had the testimony of six neighboring clergymen to the propriety of his conduct as a clergyman. If that is done carelessly and without sufficient knowledge, it is a great derogation from their own character. Therefore it is necessary, that I should examine a little their affidavits. There is so great a number, that I cannot suppose they were misled, or had any partial views to bias their judgment ; as that they were his companions. The very case has happened to me. I had a clergyman recommended to me by a recommendation, I was bound to consider as a command. It was a case of distress ; and I thought it my duty to give him the first living I could, and to inquire into his character. I wrote to the archdeacon ; who in answer said, he

did not know much of him ; as he lived at a distance ; but that he had received a reprimand from the bishop of the diocese for a very great ecclesiastical irregularity. I did not therefore give him the living. Afterwards I had a letter from the same gentleman ; saying, he was very sorry he had written to me, as the party had since behaved in the most exemplary manner. The period was about six years. I had also a letter from the bishop, saying, he had received that reprimand for an offence, of which he had undoubtedly been guilty ; but that it had a very good effect ; and I had also an excellent character of the man from the inhabitants. In consequence I gave him a better living than he would have had at the time.

March 18th. Lord CHANCELLOR [LOUGHBOROUGH]. I am perfectly justified by the countenance, that the clergy of the neighborhood have given to the relator, and the strong fact, that for the course of the last six years he has not only discharged the duty of minister of this chapel, which by the bye he was permitted to discharge, but in aid of two clergymen, he has very much to their satisfaction discharged their duty upon their occasional absence, and discharged the painful part of it, in attending upon the sick, &c. very much to the satisfaction of them and the parishioners. Under the circumstances it would be too strong to pronounce, that, whatever they may have been, his conduct and character are not now such, that I ought to concur with the wishes of the inhabitants. I should find great difficulty in confirming the * election of Mr. Haydn. [* 85] Let the decree state the affidavits, and that in consequence of the affidavits in support of his character and his conduct since in performance of the duty of the chapel of Willenhall, I declare him a person deserving the approbation of the trustees.

THE liquidated stipend of an elective minister or curate is in the nature of a charity, and an information may be maintained in respect of such stipend and election. *Attorney General v. Newcombe*, 14 Ves. 7 ; *Attorney General v. Parker*, 1 Ves. Sen. 43. But the Court of Chancery is not to be called upon, under the color of regulating a charity, to make regulations which would destroy the exercise of clear rights. *Attorney General v. Newcombe*, 14 Ves. 11. And it does not follow, that because one, or even two, void elections, to an office founded by charitable endowment, may have taken place, therefore the Lord Chancellor, when exercising the visitatorial power of the Crown, may himself make the appointment ; though it may be fit to direct a reference to the Attorney General to consider and report what directions or alterations touching the mode and right of election and appointment are proper to be made. *Attorney General v. Black*, 11 Ves. 193. For there is no doubt that the parties to whom, in the first instance, the right of nomination belongs, may forfeit it, by corruptly or improperly nominating unfit persons, or by neglecting to make any nomination within due time after notice of a vacancy. *Attorney General v. Leigh*, 3 P. Wms. 146, n. The Court will not allow the principal object of the endowment to be disappointed by the obstinacy, or the neglect, of the parties who ought to recommend or appoint. *Attorney General v. Boulbee*, 2 Ves. Jun. 388. As to the effect which usage may have upon the right of electing assistant parochial ministers ; see *Attorney General v. Scott*, 1 Ves. Sen. 415.

SCUDAMORE, *Ex parte*.

[1796, MARCH 23.]

SECURITY made by a debtor insolvent, his effects under execution, and not two months before bankruptcy, upon a previous application of a creditor ignorant of those circumstances. The Lord Chancellor thought it valid; but permitted the assignees to bring an action. (a)

Delivery of effects in contemplation of bankruptcy to a creditor, though standing perfectly *bona fide*, is bad if voluntary and without pressure, (b) [p. 88.]

THE partnership between Shepherd and Williams, attorneys, was dissolved at the request of Williams on the 3d of November, 1794. Shepherd was indebted to Haverfield to the amount of 505*l.* 15*s.* 8*d.* received by him for the use of Haverfield, to redeem annuities granted by him; which Shepherd falsely represented to have been done. Haverfield hearing of the dissolution of partnership went about the 3d of November to Williams to know, what steps he should take to recover or secure his debt. Williams advised him not to proceed against Shepherd, but to endeavor to get some good security from him, and suggested an assignment of Shepherd's share of the outstanding partnership debts as the only means he knew of to secure the said debt: but Williams declined to interfere in the business without the approbation of Shepherd. Upon this Haverfield immediately went to Shepherd, and requested to have such assignment; which Shepherd readily promised; saying he would speak to Williams and get the assignment executed and deliver it to Williams; upon which promise Haverfield left London. About the 25th of November, Williams received a message from the solicitor to Miss Osborne, informing him, that Shepherd was indebted to her, and had assigned a mortgage as security, and had agreed for farther security to assign his share of the partnership debts to her, and desiring to know, whether Williams had any objection: who in answer said, he had no objection; but he understood, Haverfield either had or was to have the first security upon the said share of the partnership debts. Upon the 29th of November, Williams received from Miss Osborne's solicitor a letter of Attorney from Shepherd to Williams to receive all debts due to the partnership, in trust, in the first place to pay Haverfield's debt, and then Miss [86] Osborne's. *In the beginning of December, Williams sent to inform Haverfield, that he had received from Shepherd a letter of attorney to secure the payment of Haverfield's debt. The letter of attorney was dated the 27th of November, 1794. It recited the partnership between Shepherd and Williams,

(a) *Dennett v. Mitchell*, 6 Law Reporter, 16; *In re Pearce*, Id. 261; *In re Rowell*, Id. 298; *Wakefield v. Hoyt*, 5 Id. 309; *In re Bailey*, Id. 320; *In re Robertson*, Id. 321. See also *Phoenix v. Ingraham*, 5 Johns. 412; *United States v. King*, Wallace, 13.

(b) *Locke v. Winning*, 3 Mass. 325; *Ogden v. Jackson*, 1 Johns. 370; *McMenomy*, 3 Johns. 71.

the debt to Haverfield from Shepherd, 2200*l.* due from him to Wood by mortgage, bond and judgment, and 434*l.* 12*s.* 5*d.* with interest, due to Miss Osborne upon bond for money received by him to her use, and that Shepherd had directed Tunstall to pay money due from him in discharge of Miss Osborne's debt, and that as a farther security he proposed to empower Williams to collect the partnership debts, in trust in the first place to pay Haverfield, next Miss Osborne, and to pay the surplus to Shepherd: it then proceeded in the common form to constitute Williams attorney for the said purpose. Upon the 6th of November an execution against the effects of Shepherd for 2100*l.* was executed, and remained in force till the 20th of December. Upon searching the office it appeared that on the 19th of December there were various executions against him for great sums. In January, 1795, a commission of bankruptcy issued against him. The assignees under that commission presented this petition, charging, that the trust for Haverfield was to give him a fraudulent preference, and praying, that Williams might be ordered to pay to them the sum of 535*l.* 14*s.* 9*d.*, in his hands on account of Shepherd's share of the partnership debts, and what he might in future receive upon the same account.

Miss Osborne being satisfied with her other security gave up her claim upon the partnership debts.

Haverfield by his affidavit stated, that when he left London, he supposed the business would be completed according to the promise, he had from Shepherd, in whom for many years he had perfect confidence; and neither at that time nor till about the middle of December had he the least idea or apprehension of Shepherd's being in a state of insolvency; that for those reasons he made no particular inquiry from either Shepherd or Williams upon the subject; and that he did not see either of them till the beginning of December; when Williams sent to inform him, that he had received the letter of attorney.

Williams by his affidavit represented, that he dissolved the partnership on finding, that Shepherd was engaged in numerous money transactions, to which he was kept a stranger; that he knew, Shepherd's affairs were in an embarrassed state; but did not know or believe, that he was insolvent; Shepherd always assuring him, that when his debts should be collected, he should have amply sufficient to satisfy all his creditors.

Attorney General, [Sir John Scott] for the Petition. The bankrupt had nothing but what should be coming to him from the debts due to the partnership. An assignment therefore of that would have been fraudulent and an act of bankruptcy: but the utmost this amounts to is a power of attorney to receive the debts; which has never been held to give a lien to cut out every other creditor. Notwithstanding all the decisions in the Courts of law upon this subject, and though Lord Mansfield said, the whole law would be a dead letter, if a trader knowing the consequence could do such an act as this, Lord Thurlow certainly has very often said, he could not conceive, how

those cases could be supported at all; though they had been law for 30 years. In this instance there was an execution in the house for 1200*l.* at the time.

Solicitor General, [Sir John Mitford] against the Petition There can be no imputation on the creditor for pressing: so far from that, the reason is, that he understands, the man's affairs are in disorder. It has been very recently decided, that a letter of attorney as security for a debt constitutes a lien, and was not revoked by the death of the party; but the executor was bound to pay the money to the creditor. *Yeates v. Groves*, ante, Vol. I. 280, is much stronger than this case. Where the security has been held void, it has always been, where the act was done in direct contemplation of both parties, that a bankruptcy should follow, or of the bankrupt alone intending a fraudulent preference; as in *Harmon v. Fisher*, Cowp. 117, but if it is fair and honorable, the fact of insolvency at the time, even if known by the creditor, will not vitiate it. This debt does not arise from contract, but from great misconduct by the bankrupt. Debts paid or securities given by traders in distressed circumstances are mostly paid under the impression of the creditor, that the debtor is in a situation, that makes such a step necessary. The result of deciding that a creditor cannot hold any security from a person, who becomes a bankrupt, unless given under process of law, will be, *that the creditor cannot forbear immediately taking the most violent steps.

LORD CHANCELLOR [LOUGHBOROUGH]. I do not controvert the doctrine, which appears to have been disapproved by Lord Thurlow: but it is a nice doctrine: and I do not feel any inclination to extend it. One feels little difficulty to accede to it, where a person about to commit an act of bankruptcy, knowing he has a very little time to stand, voluntarily, without any pressure, delivers over effects to a particular creditor. Though the creditor stands perfectly *bona fide*, yet the debtor undertaking under those circumstances to make that disposition, it ought not to prevail. But if you go by extension to apply that to this case, which is nothing more than that the act has been followed by a bankruptcy, you render it impossible for any man in the common course of business to transact with a person liable to the bankrupt laws. It is not necessary absolutely to have a bailiff in the man's presence to induce him to do the act. The creditor comes with a pressing demand upon the feelings and conscience of the man. He presses for a security. The debtor gives him a particular security. Suppose in this case it was a mortgage: I cannot conceive any ground to defeat it. The petitioners rely upon the nature of the security; a letter of attorney to receive debts generally. That is a circumstance. It approaches a little nearer to contemplation of bankruptcy: but I do not think it sufficient. I cannot take it for granted, he had nothing but his share of the debts due to the partnership. You are applying on behalf of the assignees desiring me to direct the money to be paid over. I do not think, I can make that order. If you can recover it, you may.

My opinion inclines upon the facts before me, that Haverfield is right. Let an action be brought against Haverfield, if the parties shall think proper.

WITH respect to payments made, or securities for just debts given, by an insolvent on the eve of his bankruptcy, the material question will be, whether the payment was made, or security given, by the debtor voluntarily, with an intent to give a preference to a particular creditor, (which would be fraudulent and void,) or, whether it was made in consequence of the pressing importunity of the creditor; for then actual payments, at all events, would be valid, and could not be recalled. *Fidgeon v. Sharpe*, 5 Taunt. 545; *Poland v. Glyn*, 2 Dowl. & Ryl. 312; Stat. 6 Geo. IV. c. 16, s. 82. The object of the debtor, under such circumstances, plainly is, not to give a preference, but to deliver himself. *Harman v. Fisher*, Cowp. 123. And it should seem, this consideration would be sufficient to bring the transaction within the benefit of the exception contained in the 73d section of the before-cited consolidated Bankrupt Act.

STACKPOLE v. BEAUMONT.

[1796, APRIL 14, 15.]

CONDITION in restraint of marriage under twenty-one without consent of trustees established both as to a rent-charge out of real estate and a personal legacy. (a) Testator devised his real estates to the eldest of his three natural daughters and her husband for their joint lives and that of the survivor; remainder to her sons successively in tail male; remainder to the second and her husband and issue male in the same manner; remainder to the youngest, or such person as she should first marry, (if under twenty-one, with consent of trustees,) for their joint lives and that of the survivor, with similar remainders: he also gave a rent-charge limited in the same manner to the second, her husband and issue male; and gave a similar rent-charge to the youngest, until she shall marry (under and with the restriction above-mentioned) or for her life; and when she shall marry as aforesaid, upon the same trusts; and having given the second 10,000*l.* on her marriage he gave the youngest a legacy of 10,000*l.*, payable, 5000*l.* upon her marriage (with such consent as aforesaid) and 5000*l.* two years after. Upon her marriage without consent the condition being established against the husband does not affect her estate for life in the rent-charge, [p. 89.] Husband committed for marrying a ward of the Court, and discharged under particular circumstances on undertaking to make a settlement, was held to that, and not permitted upon her consent to receive her whole fortune; namely, a rent-charge for life, [p. 89.]

Ground of the favor to marriage by the civil law, (b) [p. 96.]

Husband claiming his wife's fortune in equity; though there was a separate provision, the Court, not thinking it sufficient, made him increase it, (c) [p. 98.]

SIR THOMAS BLACKETT devised several real estates in the counties of Northumberland and Durham to John Erasmus Blackett and Thomas Cotton and the survivor and his heirs, upon trust, to the use and behoof of his nephew William Bosville for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of such one of the sons of William Bos-

(a) It is not easy to reconcile all the cases bearing on the subject of conditions in restraint of marriage. In general terms, they are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, it will be held utterly void. 1 Story, Eq. Jur. § 280; *Keily v. Monck*, 3 Ridgw. P. R. 205, 244, 247, 261; 1 Fonb. Eq. B. 1 ch. 4, § 10, note (q). And so if the condition is of so rigid a nature, or so tied up to peculiar circumstances, that the party, upon whom it is to operate, is unreasonably restrained in the choice of marriage. *Ibid.* As that a child shall not marry until fifty years of age. 1 Story, Eq. Jur. § 283; or should not marry without consent, or should not marry a man who was not seised of an estate in fee simple of the clear yearly value of 500*l.* *Ib.* § 280. But conditions, guarding against improvident matches, especially during infancy, or until a certain age of discretion, or as in the present case, providing that the party should not marry without the consent of parents, or trustees, or other persons specified, are recognized as valid. *Ib.* § 284, and English cases cited. *Malcolm v. O'Callaghan*, 1 Coop. Temp. Brough. 73. For the other distinctions on the subject, see 1 Story, Eq. Jur. § 278-290; *Parsons v. Winslow*, 6 Mass. 169.

(b) This case contains an interesting account of the introduction into the English law of the doctrines on restraints of marriage.

(c) As to the provision which Courts of Equity will require the husband to make for his wife out of any sum to be recovered on her account; see *ante*, note

(d) to *Ball v. Montgomery*, 2 V. 191.

ville as he should appoint, and of the heirs male of the body of such son; and for default of appointment, or of such issue of such son, then to the use of the 1st, 2d, 3d, 4th, and all and every other son and sons of William Bosville and the heirs male of their bodies successively; and for default of such issue, then to the use of Thomas Richard Beaumont and Diana his wife; "(one of my natural daughters)" for and during their joint natural lives and the life of the survivor without impeachment of waste; remainder to trustees to preserve contingent remainders; and from and after the decease of the survivor, then to the use of such one son of the body of his said daughter Diana, as the survivor of her and Thomas Richard Beaumont should appoint, and of the heirs male of the body of such son; and for default of such appointment, or from and immediately after the decease of such son without issue male of his body, or in case any such shall be, who lives to attain twenty-one, and shall afterwards depart this life without leaving any son or sons of his body, or such son or sons shall also attain twenty-one, and afterwards depart this life without leaving any issue male, then to the use of the 1st, 2d, 3d, and every other son and sons of the body of his said daughter Diana by her present or any future husband successively, and of the several and respective heirs male of their bodies; and for default of such issue, or in case any such shall attain twenty-one, and afterwards die without leaving any son or sons, or such son or sons should die after twenty-one, without leaving issue male, then to the use of *William Lee and Sophia [*90] his wife, "(another of my natural daughters)" for and during their joint lives and the life of the survivor without impeachment of waste; remainder to trustees to preserve contingent remainders; and from and after the decease of the survivor of William and Sophia Lee, to the use of all and every the son and sons of the body of his said daughter Sophia, by her present or any future husband, with like power of appointment, and for all such and the like estates and interest, and with the like remainders and limitations, as aforesaid in relation to the said Thomas Richard Beaumont and Diana his wife; and for default of such issue, or in case of their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one, without leaving issue male, then to the use of Louisa Wentworth "(the other of my natural daughters) or such person, as she shall first intermarry with, if any, (if before she attain the age of twenty-one, by and with the consent and approbation of the said John Erasmus Blackett and Thomas Cotton, or the survivor, and his heirs; and which person shall also previously make a competent settlement upon her, my said daughter Louisa, by deed or deeds in writing, to the like approbation of the said John Erasmus Blackett and Thomas Cotton,) for and during their joint natural lives, or the life of the survivor of them, without impeachment of waste; and from and after the determination of that estate, then to the use of the said John Erasmus Blackett and Thomas Cotton and the survivor of them, and his heirs,

for and during the life of my said daughter Louisa, or any such person as she shall so first marry, if any, and the life of the longer liver of them, upon trust, to preserve contingent remainders, and for that purpose to make entries or bring actions as occasion may require; but nevertheless to permit and suffer her my said daughter, or such person as she shall so first marry, if any, and the survivor of them, to receive and take the rents, issues and profits, for her, their, or his, own use and benefit;" and from and immediately after the decease of the survivor of his said daughter, and of such person as she should so first marry, if any, then to the use of all and every or any the son and sons of the body of his said daughter Louisa by such first or any after-taken husband, with the like power of appointment,

and for all such and the like estates and interests, and with [*91] the like remainders and limitations as aforesaid, in * relation as aforesaid; and for default of such issue of the body of his said daughter Louisa, or in case of their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one without leaving issue male, then to the use of Sir John Sinclair, for life without impeachment of waste; remainder to such one of his sons by his present wife and for such estates as he shall appoint; in default of appointment to his eldest son in fee; and as to all other his real estates, he devised them to the same trustees, to the use of Thomas Richard Beaumont and Diana his wife, and of the son and sons of his said daughter Diana and the heirs male of such son and sons, and of William Lee and Sophia his wife, and the son and sons of his said daughter Sophia and the heirs male of such son and sons, "and my said daughter Louisa, and such person as she may so marry, if any, as aforesaid, and of the son and sons of my said daughter Louisa and the heirs male of the body of such son and sons, and of the said Sir John Sinclair, and the son or sons of the said Sir John Sinclair by his said now wife, severally, respectively and successively" upon such trusts, &c. as before declared concerning the estates before devised.

The testator then charged all his real estates in Northumberland and Durham, except those devised to his nephew Bosville, with two rent-charges; and gave to John Cockshutt and his heirs one annuity or rent-charge of 3000*l.* upon trust for the use and behoof of William Lee and Sophia his wife, for and during the term of the joint natural lives of the said William Lee and Sophia his wife, and the life of the survivor; remainder to trustees to preserve contingent remainders; and from and immediately after the decease of the survivor, to the use of all or any one or more of the son and sons of the body of his said daughter Sophia and of the son or sons of such son or sons, in such shares and proportions, manner and form, and for such estate and estates, or chargeable with such sum or sums of money to the other or others of them, as the survivor of William and Sophia Lee should appoint: and in default of appointment, or as soon as the estates appointed shall determine, and as to so much as shall be unappointed, to the use of the 1*st*, 2*d*, 3*d*, and

all and every other son and sons of the body of his said daughter Sophia by her present or any future husband severally and successively and of the several and respective heirs male of their bodies; and for default of such issue * or in case of their [* 92] death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one without leaving issue male, or in case William Lee and his wife or either of them shall inherit or possess any of the aforesaid hereditaments and premises by the aforesaid devises, then he directed the said rent-charge to sink into the estate so charged with the payment thereof, and to be annihilated; and he gave to John Cockshutt and his heirs another annuity or rent-charge of 3000*l.* upon trust for the only proper use and behoof of his said daughter Louisa Wentworth and her assigns "until she shall marry (under and with the restriction above mentioned) or for and during the term of her natural life; and when and so soon as she my said daughter shall marry as aforesaid," then upon such trusts, in like manner, and with the like powers, for such estates and interests, and with the like remainders and limitations, and subject to the same contingencies and annihilations, as before declared concerning and in relation to the aforesaid rent-charge devised for the benefit of Sophia. He also gave his daughter Louisa a legacy of 10,000*l.* "payable and to be paid unto her in manner following; that is to say, the sum of 5000*l.* upon her marriage (with such consent and approbation as aforesaid) and the sum of 5000*l.* within two years next afterwards." He gave all his personal estate subject to his debts, legacies, and funeral expenses, to Thomas Richard Beaumont; and appointed him executor.

The testator left three co-heiresses at law. Two of them had small annuities by the will. Nothing was given to the third.

Upon the marriage of Mrs. Lee the testator had given her 10,000*l.*

The trustees did not act under this will; and upon the death of the testator, Thomas Richard Beaumont took possession both of the real and personal estate. Louisa Wentworth, while an infant and a ward of the Court of Chancery, went to Scotland with William Stackpole; and they were there married without the consent of the trustees.

Mr. Stackpole was committed to the Fleet: but being in the army he was discharged upon undertaking to make a proposal for a settlement.

The bill was filed by Mr. and Mrs. Stackpole praying, [93] that the trusts of the will might be executed; and that the Plaintiff William Stackpole in right of his wife might be declared entitled to the rent-charge of 3000*l.* and to the legacy of 10,000*l.*, and to have one moiety of the legacy paid immediately; and that it might be referred to the Master to receive a proposal for a settlement; that the accounts might be taken; and that the arrears of the rent-charge together with one moiety of the legacy with interest from the marriage might be directed to be paid for the use of the Plaintiffs, as the Court should think proper; and that the other

for and during the life of my said daughter Louisa, or any such person as she shall so first marry, if any, and the life of the longer liver of them, upon trust, to preserve contingent remainders, and for that purpose to make entries or bring actions as occasion may require; but nevertheless to permit and suffer her my said daughter, or such person as she shall so first marry, if any, and the survivor of them, to receive and take the rents, issues and profits, for her, their, or his, own use and benefit;" and from and immediately after the decease of the survivor of his said daughter, and of such person as she should so first marry, if any, then to the use of all and every or any the son and sons of the body of his said daughter Louisa by such first or any after-taken husband, with the like power of appointment, and for all such and the like estates and interests, and with [*91] the like remainders and limitations as aforesaid, in * relation as aforesaid; and for default of such issue of the body of his said daughter Louisa, or in case of their death after attaining twenty-one without leaving any son or sons, or of the death of such son or sons after twenty-one without leaving issue male, then to the use of Sir John Sinclair, for life without impeachment of waste; remainder to such one of his sons by his present wife and for such estates as he shall appoint; in default of appointment to his eldest son in fee; and as to all other his real estates, he devised them to the same trustees, to the use of Thomas Richard Beaumont and Diana his wife, and of the son and sons of his said daughter Diana and the heirs male of such son and sons, and of William Lee and Sophia his wife, and the son and sons of his said daughter Sophia and the heirs male of such son and sons, "and my said daughter Louisa, and such person as she may so marry, if any, as aforesaid, and of the son and sons of my said daughter Louisa and the heirs male of the body of such son and sons, and of the said Sir John Sinclair, and the son or sons of the said Sir John Sinclair by his said now wife, severally, respectively and successively" upon such trusts, &c. as before declared concerning the estates before devised.

The testator then charged all his real estates in Northumberland and Durham, except those devised to his nephew Bosville, with two rent-charges; and gave to John Cockshutt and his heirs one annuity or rent-charge of 3000*l.* upon trust for the use and behoof of William Lee and Sophia his wife, for and during the term of the joint natural lives of the said William Lee and Sophia his wife, and the life of the survivor; remainder to trustees to preserve contingent remainders; and from and immediately after the decease of the survivor, to the use of all or any one or more of the son and sons of the body of his said daughter Sophia and of the son or sons of such son or sons, in such shares and proportions, manner and form, and for such estate and estates, or chargeable with such sum or sums of money to the other or others of them, as the survivor of William and Sophia Lee should appoint: and in default of appointment, or as soon as the estates appointed shall determine, and as to so much as shall be unappointed, to the use of the 1st, 2d, 3d, and

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moiety might be secured for their benefit till the expiration of two years from their marriage.

The issue of the marriage was one son.

Mr. Mansfield, Mr. Graham, Mr. Grant, Mr. Anstruther, and Mr. Stanley, for the Plaintiffs. As to the rent-charge the question is, what the words "so" and "such" mean. There is nothing to induce the Court to refer those to the condition, and not to the preceding words. If Mr. Stackpole cannot take, because he does not answer the description, the alternative does not arise; and therefore Mrs. Stackpole's estate for life is absolute; and her children by any husband will be entitled after her death. In the event of a marriage without consent the testator does not take away the provision of his daughter; but only excludes the husband, who has not complied with the condition. Not meaning to punish his daughter he could not mean to punish the children of the first marriage, and carry it over to the children by a second husband. As to the legacy of 10,000*l.*, it is now become a mere question of authority; for none of the cases can be supported by solid reasoning. This is precisely one of those, in which the construction of this Court goes exactly with the Civil Law and the Ecclesiastical Court, that this condition annexed to a personal legacy is only to be considered as *in terrorem*. All the authorities are in *Scott v. Tyler*, 2 Bro. C. C. 431 (1). One passage in the Digest puts an end to the distinctions between conditions precedent and subsequent: they are equally void, if the effect is to throw any limitation upon marriage: "*Si arbitrato Titii Seia nupserit, hæres meus ei fundum dato. Vivo Titia etiam sine arbitrio Titii eam nubentem legatum accipere respondendum est; eamque legis sententiam * videri; ne quod omnino nuptiis impedimentum inferatur.*" Dig. 35, tit. 1, l. 72. There are many passages in Godolphin and Swinburne, that totally do away that distinction; and from Mr. Alexander's argument in *Scott v. Tyler* it appears clearly, that Chief Baron Comyns, who supported it in *Harvey v. Aston*, For. 212. 1 Atk. 361. Com. 726 (2), was quite mistaken in the passage he cited from the civil law. This is more favorable than some of the cases; for there is first a positive absolute bequest of the legacy: but in *Scott v. Tyler* it was no otherwise given than by the direction to pay. In *Harvey v. Aston* the charge was upon land, and therefore to be governed by the law of England. In *Reynish v. Martin*, 3 Atk. 330, 1 Wils. 130, and *Wheeler v. Bingham*, 1 Wils. 135, the legacy was established. Those cases were against the bias of Lord Hardwicke's mind; for no man was more desirous to prevent improvident marriages. Here there is no bequest over. It is impossible that a general gift of the personal estate can amount to a bequest over of a particular legacy: if so the appointment of an executor would do.

Attorney General [Sir John Scott], Solicitor General [Sir John Mit-

(1) 2 Dick. 712, from Lord Thurlow's MSS.

(2) Willes, 83.

ford] and Mr. *Richards*, for the Defendants. It is clear, Mrs. Stackpole is entitled for her life to the rent-charge; and Mr. Stackpole has no interest in it. The question as to the children the Court will not touch now.

The legacy is not payable. *Underwood v. Morris* 2 Atk. 184, was doubted by your Lordship in *Hemmings v. Munkley*, 1 Bro. C. C. 303; and Lord Thurlow denied its authority (1) in *Scott v. Tyler*; which is decisive, that the character of the legatee not being such as entitles her, and the restraint of marriage not being absolute, it does not fall into those cases, to which the doctrine of the civil law applies. So far is this condition from being illegal, that the policy of the law approves it.

Mr. *W. Agar*, for the co-heiresses at law, contended, that they could not be disinherited without express words or necessary implication; therefore under this will Mrs. Stackpole took no estate in the rent-charge; the condition in the parenthesis extending to her interest.

LORD CHANCELLOR [LOUGHBOROUGH]. There is nothing before me now for determination, except the provision to be made for Mrs. Stackpole by a proposal to be made by her husband, and the question upon the legacy. As to the children, it is not proper for the Court to make a declaration upon what will be the construction in cases that have not happened, and as to which perhaps no question may arise.

It is very clear, that Mrs. Stackpole is entitled for her life to this rent-charge of 3000*l.* a year. The construction cannot depend upon the parenthesis inserted by the person, who drew the will. It is impossible from any words to argue, that Mr. Stackpole can have a life estate in that rent-charge; and it goes contrary to my idea of the clear intention of the testator. Though the person, who drew the will, has a very unfortunate style, and it is very confused and perplexed, I have seldom met with a will, in which the intention was more perspicuous. He meant, as far as circumstances would bear it, to put Louisa precisely upon the same footing as Sophia; treating them both as younger children. Mrs. Lee upon her marriage had 10,000*l.* He gave to her and her husband, whom he knew, a rent-charge jointly for their lives, and the life of the survivor, with remainders to her children. [* 95] By words of reference describing the particular provision necessary according to the circumstances, in which he foresaw he should leave Louisa, he directs a settlement for her by reference to the rent-charge for Mrs. Lee. He meant to guard against her marriage under age without consent of the persons, he meant to make her guardians. He meant to impose upon them the necessity of finding the husband, he described for her; and in the event of her marrying such a person he gives him the same estate that he had given to Mr. Lee. In all other respects he puts her upon exactly the same footing as Mrs. Lee. Any second husband would no more have been entitled to

(1) Mr. Sanders in his edition of Atkyns states, that the report of *Underwood v. Morris* agrees with the Register's Book.

this life estate than any second husband of Mrs. Lee to the estate, he had given to Mr. Lee. Therefore Mrs. Stackpole is entitled to the rent-charge for her life; and her husband must lay a proposal before the Master.

As to the legacy, this has been long *veraxata questio*. It is impossible to reconcile the authorities, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of [* 96] * personal and out of real estate. The construction ought to be precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. The case of all these questions is plainly this. In deciding questions, that arise upon legacies out of land, the Court very properly followed the rule, that the common law prescribes, and common sense supports, to hold the condition binding, where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty upon the supposition, that the Ecclesiastical Court had adopted a positive rule from the civil law upon legatory questions; and the inconvenience of proceeding by a different rule in the concurrent jurisdiction, (it is not right to call it so) in the resort to this Court instead of the Ecclesiastical Court, upon legatory questions, which after the Restoration was very frequent, in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for, but upon this circumstance, that in the unenlightened ages, soon after the revival of Letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned; but only looked into the books, and transferred the rule, without weighing the circumstances, as positive rules to guide them. It is beyond imagination except from that circumstance, how in a Christian country they should have adopted the rule of the Roman law with regard to conditions as to marriage (1).

First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law, where divorce is not permitted. Next the favor to marriage, and the objection to the restraint of it, was a mere political regulation applicable to the circumstances of the Roman Empire at that time and inapplicable to other countries. After the civil war the depopulation occasioned by it led to habits of celibacy. In the time of Augustus the Julian law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy (it is an odd expression) and for the encouragement of all persons, who would contract marriage, it necessarily followed, that no person could act contrary to it by impos-

(1) See the judgment in *Pearce v. Loman*, *post*, 139.

ing restraints directly contrary to the law. Therefore it became a rule of construction, that these conditions were null. It is difficult to apply that to a country, where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage, their children or objects of bounty may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine, not to lay conditions to restrain marriage under the age of twenty-one to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one without the consent of the parent (1).

This testator places trustees in the room of a parent; and gives *quoad* the marriage the authority to them. I am now called upon to pronounce, that this condition is bad, because it is illegal to impose a condition in restraint of marriage. What: illegal here? I have committed this gentleman for marrying without consent. It is impossible to say, that a condition has any stamp of illegality, impolicy, or impropriety, that does no more than add an extension of bounty to induce them to do that, which neglecting to do the husband becomes an object of the censure of this Court and liable to punishment. Therefore I am perfectly free in this Court in a case, where the condition only operates up to the age of twenty-one, and requires no more than the general policy of the law and course of this Court hold to be proper, to say, there is nothing illegal in such a condition; and therefore not to determine, that this legacy, which the testator directs to be paid only under certain circumstances, shall be paid, not only though those circumstances have not happened, but where every thing has been done directly in opposition to and in defiance of the directions of the will. Confined therefore to such cases, where the restraint operates only up to the age, till which by the law and policy of the country consent is necessary, I have no difficulty to say, there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid.

In *Scott v. Tyler*, there is a very accurate though not a very extended opinion of Lord Thurlow (2), which carries conviction along with it. The question is not, whether any forfeiture has been incurred; but whether the parties, to whom the legacy is given, have put themselves in a situation to answer that description of the person to take. There is no gift here but in the direction to pay; for I cannot stop in the middle of a sentence. He gives her 10,000*l.*: that is in effect two sums of 5000*l.* one payable upon her marriage with consent. She has not married *with consent. [* 98] She has married without it. Can she claim the 5000*l.* under the will? I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points

(1) Statute 26 Geo. II. c. 33.

(2) Lord Thurlow's judgment, from his Lordship's own manuscript, has been since published, 2 Dick. 712.

CHANDLESS v. PRICE.

[1796, APRIL 15, 18.]

A LIMITATION of personal property after a disposition, that would raise an intail express or implied in real estate, is void ; and the person, who would be tenant in tail, takes the absolute interest. (a)

WILLIAM WILLIAMS by his will disposed thus : " I give and bequeath all my property real and personal to be divided equally between my daughter Mary Williams and my daughter in law Catherine Jennings excepting two farms in the county of Cardigan ; " which he described and then proceeded thus : " I mean, that I give and bequeath and devise to my daughter Mary Williams and to her children legitimately born those two farms of Perygraig and Cricklas and also the Chalk Field at Loompit Hill in the parish of Lewisham in Kent : " which he describes to be let upon condition to build ; which articles not being performed, he declares the lease to be forfeited, and then proceeds thus : " in case my daughter Mary Williams dies without any legitimate issue surviving her, the farms of Perygraig are to revert to my brother David Williams, vicar of Caron in the county of Cardigan and to his heirs ; or should he die without legitimate issue, to the son of my late brother Richard Williams of Perygraig in the parish of — ; but the Chalk Field in Loompit Hill in the parish of Lewisham, Kent, I order to be sold, and the produce to be equally divided between my nieces, the daughters of my late brother Richard Williams. The rest and residue of my real and personal property of what kind or nature soever I give and bequeath in failure of legitimate issue by my daughter Mary Williams to my daughter in law Catherine Jennings ; and after her decease without legitimate issue to Sarah Medhurst, wife of Granville Medhurst, for her sole use, and to be divided equally after her death between her children " by him " reserving all the interest, usages, profits, and advantages, for the benefit and emoluments of my dear most deserving wife during her life."

The testator appointed his wife executrix ; and gave her the full disposal of all his household furniture, plate, linen, china, &c. and books, and appointed guardians for his daughter Mary Williams. He then proceeded thus : " I have a most affectionate love for all my three children : but I give to Sarah Medhurst at her marriage as ample a proportion, as could be adjudged equitable and just, of my property : but if her sisters should die without children, [* 100] she will be * entitled to a farther share of my effects, as set forth in this my last will and testament."

(a) There is some question as to the essential accuracy of the proposition, that there can be no estate-tail in personalty. See, *ante*, note (a) to *Fordyce v. Ford*, 2 V. 536, where some conflicting opinions are collected ; also note (a) to *Douglas v. Chalmer*, 2 V. 501, with regard to the remainder and limitation of chattels.

This will was attested by three witnesses : but the testator had no real estate.

By a codicil among other things reciting the death of his wife he bequeathed all his household furniture, plate, linen, china, and books, to his daughter Mary Williams and his daughter in law Catherine Jennings, to be divided between them share and share alike ; and he appointed Price and two other persons executors and guardians of his daughter Mary Williams.

Mary Williams married Chandless ; and the bill was filed by them and Catherine Jennings, praying, that they might be declared to be entitled to the residue of the testator's property absolutely ; and that the trustees might assign accordingly. The only question made was as to the validity of the limitation to Sarah Medhurst.

Attorney General [Sir John Scott], and Mr. King, for the Plaintiff. The conclusion upon this will must be either to give Mary Williams and Catherine Jennings the absolute interest, or that the former should take the whole under the clause disposing of the residue of the real and personal property. She must have an estate tail in the excepted farms, liable to be defeated certainly by her leaving no issue surviving her ; which brings it to *Driver v. Edgar*, Cowp. 379, and a recovery by her would notwithstanding be valid. The ground for holding, that a gift to a man, and if he dies without issue, over, creates an estate tail in real, and an absolute interest in personal estate, is, that as land is capable of being entailed, the testator is understood to mean, that all the issue shall take, that can take according to that meaning ; and therefore the Court implies, that they shall take as heirs of the body ; and in that character they must take by descent ; by necessity therefore it operates as an enlargement of the estate of the first taker : in the other case it is not an estate tail ; because that is not applicable to personalty : but the words equally import, that all the issue are intended to take ; and there is no other way of pursuing that intention than by giving to the first taker such an interest, as will enable him to make them all take. So Mr. Fearne takes it. The exception, he lays down, is that in the case of personal estate the Court pays attention to any circumstances to *confine it to the death of the [* 101] party. The distinction in *Forth v. Chapman*, 1 P. Will. 663, between freehold estates and chattel interests has been lately discountenanced in *Porter v. Bradley* (1), 3 Term Rep. B. R. 143. In *Attorney General v. Baily*, 2 Bro. C. C. 558, Lord Thurlow shortly but satisfactorily explains Mr. Fearne's principle ; which is strongly confirmed by the cases. *Nichols v. Hooper*, *Target v. Gaunt*, *Pinbury v. Elkin*, 1 P. Will. 198, 432, 563. *Bigge v. Benseley*, 1 Bro. C. C. 187. This testator meaning to make these two ladies

(1) See Mr. Powell's note in his edition of Fearne's Exec. Dev. 211 ; *post*, vol. ix. 203. Lord Eldon strongly supports the distinction in *Forth v. Chapman* ; admitting however vol. xix. 303, in *Wright v. Atkins*, the difficulty of attributing to a testator the intention to use words in different senses with reference to the different estates. *Elton v. Eason*, vol. xix. 73.

quasi tenants in tail has given them the absolute property in the first instance ; and he has not by any words cut down that absolute interest to a mere tenancy for life.

Solicitor General [Sir John Mitford], and Mr. Richards, for the Defendant Medhurst. In *Trotter v. Osgood*, which was very much argued before Lord Kenyon, when Master of the Rolls, the reasoning was, that it appeared, the intention was not to create an estate tail ; and therefore with regard to personal property the technical force of the words should not have that effect. Here the intention to confine it appears.

LORD CHANCELLOR [LOUGHBOROUGH]. I have understood the rule, that has for a long time prevailed, to be to try it by this : would the words give an estate tail in real estate ? If so, they give the absolute property in personalty ; unless you can find in the will something to show, he meant to tie it up. In a case, I have found in Lord Thurlow's time, the determination goes very clearly in the circumstances to this rule ; that where the necessary construction of the words would give an estate tail in land, the limitation over must be void, because the preceding limitation amounts to an absolute disposal of it ; it is inaccurately said, it gives an estate tail. That was *Glover v. Strothoff*, 2 Bro. C. C. 33. I agree, if you can find words to tie it up, they will control it : otherwise I must give the natural effect to the words. From the time of *Beauclerk v. Dormer*, 2 Atk. 308, the words "die without issue" must be taken indefinitely. The reason is obvious : the meaning of the words, as fixing the period, must be the same in the same will ; though they may have a different operation as to real and personal estate. In *Daw v. Lord Chatham* (1), the whole contemplation of the argument in support of the decree of the Lords Commissioners was, that the rule in *Shelly's Case* could not apply to a bequest purely of personal property ; the reason of it does not connect itself with [* 102] personal property. *The distinction taken by Lord Talbot in *Atkinson v. Hutchinson*, 3 P. Will. 258, that where the words would give an express estate tail, the construction of law must obtain, but where only an implied estate tail, it should not, was very much labored in *Daw v. Lord Chatham* ; for in that case there was manifestly an express estate for life, and there were circumstances to show, how anxiously the testator endeavored to restrain it to an interest for life. From the manner, in which the question was left to the Judges, and from some notes, I have concluded, that that distinction is exploded : and that it is to be taken as a general rule, that where the words would raise an estate tail in real estate, they will give the absolute property in personalty ; and if there is no distinct expression to restrain it to the time the law allows, the consequence must prevail, whatever is the intention.

(1) Fearn, 347 ; 6 Bro. P. C. 450 ; 1 Madd. 488, under the title of *Tothill v. Pitt*. The judgment of the Lords Commissioners, reversing the decree of the Master of the Rolls, was reversed in the House of Lords. 7 Bro. P. C. 473 ; Mr. Tomlins's edition, 453.

With regard to this cause I have little difficulty. I must set out with a confession, that I cannot reconcile the jarring parts of the will with each other, nor with confidence pronounce, what really was the intention. The words are so inapplicable, that it is upon the whole a matter of real uncertainty, whether the latter part, which is a sort of comment upon the first, ought to control it, and whether they do not by dividing the property violate the real intention. It was first directed, that they should divide it between them. Afterwards, after this strange long disposition of the farms in Wales he gives it to them so, that it seems, that Mary should take first, and Catherine only in remainder; and then upon failure of her issue he calls in Sarah Medhurst; limiting her to an interest for life, and not giving it as matter of inheritance to her children, but to be divided among them. There is nothing here except the promiscuous use of the words "children" and "issue," that creates any doubt. I think, though the testator had no real estate, yet when he mentions real estate, I must take him to mean the words to operate, as they would upon real estate; and I must extend the word "children" by the word "issue." There is no doubt, that Mary Williams would have had an estate tail in land; and if so, she would have an absolute estate in personal property. The two parts of the will are quite irreconcilable: but I have only to pronounce, that the limitation to Mrs. Medhurst is too remote (1).

SEE, *ante*, the notes to *Fordyce v. Ford*, 2 V. 536.

(1) *Everest v. Gell*, *ante*, vol. i. 286, and the note.

GRAY v. MINNETHORPE.

[1796, APRIL 15, 26.]

DEVISE in trust to sell for payment of debts and funeral expenses, with a particular disposition of the surplus money; the personal estate, not being otherwise disposed of than by the appointment of an executor, who was not one of the trustees, is first liable to the debts, &c. especially as the produce of the sale was not sufficient for them. (a)

The Court is bound to give effect to all the will, (b) [p. 105.]

An old account shall not be unravelled; though settled upon an erroneous principle, (c) [p. 106.]

Costs, [p. 106.]

THOMAS SIMPKIN devised to Joseph Boyes and William Minnethorpe and their heirs and the heirs of the survivor his dwelling-house with the yard and kilm thereto adjoining and belonging, situate in Castle Gate in New Malton, "and also all my lands, hereditaments, and premises, which I myself purchased, not those, which I and my mother purchased, of James Hebblethwaite, Esq. situate in Norton, in the said county of York, and also all the tithe estate situate in Norton aforesaid, which I also lately purchased of the said James Hebblethwaite, upon trust, that they, the said Joseph Boyes and William Minnethorpe, or the survivor of them, or the heirs of such survivor, shall and do as soon after my decease, as conveniently may

(a) One of the elements which enter into this case, with regard to the presumption of a gift of the unbequeathed residue to the executor, is of little practical consequence in the United States; where the residue is by law distributed among the next of kin, in the absence of all contrary expressions of intention by the testator. See, *ante*, note (a) to *Bennet v. Bachelor*, 1 V. 68. And it would be of little importance in England, since the Statute 1 Wm. IV. cap. 40, which adopts the same principle. 2 Williams, Exec. 1050. See *Wilson v. Wilson*, 3 Binn. 557; *S. C.* 9 S. & R. 424; *Neaves's Estate*, 9 S. & R. 186; *Hays v. Jackson*, 6 Mass. 153; *Hill v. Hill*, 2 Hayw. 298; *Denn v. Allen*, 1 Penn. 44; 2 Tucker's Blackstone, 514, note. Of course, the inference against the claim of exemption of the personal estate, from the circumstance of its falling to the executor for his benefit *virtute officii*, which was sought to be established in the present case, now loses its force. See Williams, Exec. 1215, 1216. As to the exemption of the personal estate, see 1 Story, Eq. Jur. § 572, and cases cited; *Dunlap v. Dunlap*, 4 Dessaus. 329; *Lupton v. Lupton*, 2 Johns. Ch. 628; *Livingston v. Newkirk*, 3 Johns. Ch. 319; *M'Kay v. Green*, *ibid.* 56; 2 Williams, Exec. 1201—1219. See also note (a) to *Kidney v. Coussemaker*, 1 V. 436.

(b) See, *ante*, note to *Collet v. Lawrence*, 1 V. 270; 2 Williams, Exec. 793, 794.

(c) Any mistake, omission, accident or fraud will justify a Court of Equity in opening and re-examining a settled account. 1 Story, Eq. Jur. § 523, 527, and English cases cited; *Perkins v. Hart*, 11 Wheat. 237; Story, Eq. Pl. § 798—802. But if the demand is of a legal nature Equity will be governed by the Statutes of Limitations. *Spring v. Gray*, 5 Mason, 527; *Sherwood v. Sutton*, 4 Mason, 143. If it is of a purely equitable nature, the demand will be repelled, wherever a considerable lapse of time has ensued, from motives of public policy, not to entertain stale or antiquated accounts, and not to encourage laches and negligence. 1 Story, Eq. Jur. § 529, and English cases cited; *Moore v. White*, 6 Johns. Ch. 360; *Rayner v. Pearsall*, 3 Johns. Ch. 578; *Ray v. Bogart*, 2 Johns. Cas. 432; *Ellison v. Moffat*, 1 Johns. Ch. 46; *Sherwood v. Sutton*, 4 Mason, 143; *Robinson v. Hook*, *ib.* 139; *Piatt v. Vattier*, 9 Peters, 405; *Willison v. Watkins*, 3 Peters, 44; *Miller v. McIntire*, 6 Peters, 61.

be, make sale thereof for the best price or prices, that can reasonably be had for the same; and out of the moneys arising by such sale or sales pay all my just debts and funeral expenses; and then put and place out at interest all the residue of the said moneys, and pay the interest to grow due for the same, unto my brother George Simpkin for and during his natural life; and after his decease to pay the said principal money unto and among my nephews and nieces hereinafter named, and in such proportions as hereinafter mentioned: that is to say; to my nephews, Thomas Gray, Timothy Gray, and Thomas Donkin, and to my nieces, Anna Gray, Jane Gray, Catherine Gray, Sarah Donkin, and Anne, the wife of John Donkin my nephew, the sum of 50*l.* a-piece; and then pay all the residue of the said principal money, if any there be, unto my nephew John Gray.

This testator devised another real estate to his brother George Simpkin in tail, appointed him sole executor, and died on the 27th of March, 1768, the day after the date of his will. The executor proved the will: but as he was an ignorant man, the trustees of the real estate took possession of the personal property and acted for him in the execution of the will. They also sold the lands devised to them for 1592*l.*; which they applied towards payment of the testator's debts amounting to 2153*l.* 4*s.* 11*d.*; and the remaining debts were paid out of the personal estate. An account to that effect was delivered by Boyes, the surviving trustee, to the widow and executrix of George Simpkin in 1771. The bill was filed by the persons interested in the residue of the produce of the sale of the * trust estate under the will to have the sums given to [* 104] them out of that fund paid and the accounts taken; and it prayed, that, if the said fund, or any part thereof, had been paid in discharge of the debts and funeral expenses in exoneration of the personal estate, what had been so paid should be made good out of the personal estate.

Attorney General [Sir John Scott] and Mr. Daniel, for the Plaintiffs. There is nothing to exempt the personal estate from being first applied. The mere constitution of an executor, together with a trust to sell for payment of debts, will not amount to an exemption of the personal estate, *Walker v. Jackson*, 2 Atk. 624. 1 Wils. 24; in which Lord Hardwicke puts his decree upon the express bequest of the personal estate, and says, *Adams v. Meyrick*, 1 Eq. Ab. 271, was a weak decision; and it met with farther disapprobation in *Stephenson v. Heathcote* before Lord Keeper Henley (1), and in *The Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, in both of which the personal estate was not exempted. *Mead v. Hide*, 2 Vern. 120, *Samwell v. Wake*, 1 Bro. C. C. 144, *Lord Inchiquin v. O'Brien*, Amb. 33. 1 Wils. 82.

Solicitor General [Sir John Mitford] and Mr. Wetherell, for the widow and executrix of George Simpkin. The legacies being

(1) Stated in *The Duke of Ancaster v. Mayer*, 1 Eden, 38.

expressly given only out of the real estate, the personal estate cannot be applied to them: *Hone v. Medcraft*, 1 Bro. C. C. 261. The intention is, that the executor shall take the personal estate beneficially and as an entire fund, subject only to the expense of probate. *Webb v. Jones*, 2 Bro. C. C. 60. Lord Kenyon there says, there is no magic in words; but if the intention is evident to exonerate the personalty, it must be exonerated. Where the direction has been to sell the estate out and out, and to convert it into personal estate, and give it in that character, the reasoning, that the personal must be applied first as the proper fund, does not hold, but much slighter words will in that case be sufficient to show the intention to exempt it. In *Stapleton v. Colville*, For. 202, Lord Talbot argues upon the supposition of a distinction between a mere charge or trust for payment of debts and an express desire to sell and convert the property out and out; and he refers to *Bamfield v. Wyndham*, and *Wainwright v. Bendloes*, Pre. Ch. 101, 451; 2 Vern. 718. In *Feltham's Case*, 1 Eq. [*105] Ab. 271. 1 Lev. 203, *it was asserted at the bar, and admitted by the Master of the Rolls, that where another fund is provided, an executor shall be exonerated, but not an administrator; and that case has been often cited without disapprobation. In *Mead v. Hide* one question was, whether the executor having a legacy could as such take the personal estate; for it really was personal estate to be distributed among the next of kin; and there was no doubt, that if there was no executor, it must in the hands of the administrator be applied to debts notwithstanding a particular charge. In this case the particular disposition of the residue of the produce of the sale shows the intention to convert it into personal estate. Nothing being given to the executor out of the personal estate, his title against the next of kin is clear. The trustees being directed to pay all the debts and funeral expenses are put in the place of executors. This has been for near thirty years treated as the property of George Simpkin, who is heir at law disinherited to the extent of the sale. In *Stephenson v. Heathcote* there were particular circumstances. It was not a devise to sell out and out; but a charge upon an entailed estate in the form of a power to sell given to the wife, who was also the executrix; and the circumstance, that the executor is the person to dispose of the real estate, has been often relied on to show, he was intended to take beneficially only the residue after debts paid. The trust being to raise so much as should be *fully* sufficient to satisfy all his just debts and funeral expenses, according to the note I have, the word "*fully*" was of great force; showing, it is only intended in aid; and the word "*residue*" was considered to mean subject to debts, nothing but a tobacco-box having been given out of the personal estate. *Lord Inchiquin v. O'Brien* falls within those cases, where the personal estate and the residue of the produce of the real are given to the same person; and so much as should not be sold was given in strict settlement. *Dolman v. Smith*, 2 Vern. 740. Pre. Ch. 456, went upon the circumstance, that the

person to have the real and personal estate was the same, and the age of that person. The words disposing of this real estate are very strong. As to the necessity of an irresistible inference, in *Brummel v. Prothero* (1) the Master of the Rolls did not like that expression.

LORD CHANCELLOR [LOUGHBOROUGH]. This Court is bound to give effect to all the will. It is very clear, the testator meant by the sale of the *real estate to provide a fund for his [*106] debts. It is equally clear, he supposed there might be a residue; of which he disposes; and then after answering all these payments he supposes there will be still a residue, and gives that to another person. Then as to the personal estate, there is no mention of it in the will, except the mere nomination of an executor. No case comes up to that, that the mere nomination of an executor, though under circumstances, that would give to him beneficially the personal estate, and not make it distributable to the next of kin, shall have the same effect as a distinct specific gift of it to an individual; as there was in *Bamfield v. Wyndham*, and *Wainwright v. Bendloes*; and it would be a strong conclusion, when the effect would be to defeat those gifts, the testator has clearly intended to make, if there should be a fund out of the produce of the sale of his real estate. They are not strictly legacies; but they are certainly in the nature of legacies; and the Defendant's construction would in effect give to a person only nominated executor a right to all the personal estate in opposition to those persons, who are entitled to those sums by the will. Therefore I have no difficulty in holding, that the personal estate, not particularly given to any one, but merely attached to the person of the executor, shall be liable in the first place. Upon that ground I shall direct an account: but there is no possibility of unravelling the account, that has been settled. Whatever has been taken as an account ought to stand. What I mean is, I shall not give directions, that shall oblige them to take the account, as if it was a recent transaction. If they can show any part of the personal estate and trace it, well and good. The costs must come out of the fund; and the residue, after paying the costs, and the several sums of 50*l.* must be paid over to the nephew John Gray.

In *Stephenson v. Heathcote*, in the trust to sell so much of the real estate, as should be fully sufficient to satisfy the debts, &c., the word "fully" might have helped those, who contended for the exemption of the personal estate. It might be supposed to signify not partially (1).

1. THAT effect ought to be given to every word of a will, provided an effect can be given to every word consistently with the general intent of the whole, taken together; see, *ante*, note 4 to *Blake v. Bumbury*, 1 V. 194.

2. As to the circumstances which may defeat an executor's ordinary claim to

(1) *Post*, 111.

(2) See the three following cases; *Dohman v. Weston*, 1 Dick. 26; Mr. Cox's notes, 2 P. Will. 294, and 3 P. Will. 325, to *Howell v. Price*, and *Haslewood v. Pope*; *post*, *Burnaby v. Griffin*, 266; *Holford v. Wood*, *Tait v. Lord Northwick*, vol. iv. 76, 816; *Hartley v. Hurle*, v. 540; *Brydges v. Phillips*, vi. 567; *Watson v.*

any residue of his testator's personal property not actually disposed of; see note 1 to *Bennet v. Bachelor*, 1 V. 63; and the notes to *Nourse v. Finch*, 1 V. 344.

3. As a general principle, the personal estate of a testator is the primary fund for payment of debts and legacies; to exclude the operation of this rule, a special intent to the contrary must appear to the satisfaction of the Court. See notes 2 and 4 to *Hamilton v. Worley*, 2 V. 62, and to the references there given, add the case of *Stapleton v. Stapleton*, 2 Ball & Bea. 527, where the present decision was particularly adverted to and followed.

4. That a Court cannot, several years after an account has been settled, consider the matter as open as before; see *Lord Courtney v. Godechall*, 9 Ves. 477. See, also, note 1 to *Matthews v. Wallwyn*, 4 V. 118.

[* 107]

BURTON v. KNOWLTON.

[ROLLS.—1796, JULY 27.]

UNDER a devise to sell and pay debts and funeral expenses the personal estate was exempted without express words upon the evident intention. (a)

Codicil is to be taken as part of the will, (b) [p. 110.]

Where there is an express direction in a will, that the debts, &c. shall be paid out of the real estate, the person, to whom the personal is bequeathed, takes it exempt, [p. 110.]

MARY COCKELL devised all her freehold, copyhold and leasehold, messuages, lands, tenements and hereditaments, parts and shares of messuages, lands, tenements and hereditaments, and all her real estate, to two trustees, upon trust after her death with all convenient speed to sell, dispose of, and convey, either together or in parcels for the best price, that could be procured, all or any part of her said real estate, and with the money arising from the sale, to pay off and

Brickwood, ix. 447; *Hancox v. Abbey*, xi. 179; *Tower v. Lord Rous*, xviii. 132; *Bootle v. Blundell*, xix. 494, 1 Mer. 193; where this subject is fully discussed, and all the authorities minutely examined by Lord Eldon. *McClelland v. Shaw*, 2 Sch. & Lef. 538; *Maugham v. Mason*, 1 Ves. & Bea. 410; *Aldridge v. Lord Wallscourt*, 1 Ball & Beat. 312; *Stapleton v. Stapleton*, 2 Ball & Beat. 523; *Giltins v. Steele*, 1 Swanst. 24; *Barnewell v. Lord Caudor*, 3 Madd. 453; *Greene v. Greene*, *Browne v. Groombridge*, 4 Madd. 148, 495; *Michell v. Michell*, 5 Madd. 69; *Noel v. Lord Henley*, 7 Pri. 241.

(a) As to the exoneration of the real estate by the personal, see 2 Williams, Exec. 1201—1219; 1 Story, Eq. Jur. 571, 572, and cases cited. It is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts and legacies. The rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. In other words, it is not by an intention to charge the real, but by a plain intention to discharge the personal estate, that the question is to be decided. See also note (a) to *Kidney v. Cousmaker*, 1 V. 436.

(b) See *Monypenny v. Bristolow*, 2 Russ. & M. 117; *Yarnold v. Wallis*, 4 Y. & C. 160; 1 Williams, Exec. 8. A will and codicil are to be read as being made at the same time, and incorporated together. It is an addition to, or explanation of, a will—a part of it, and may be made before or after the will; and there may be more than one to the same will. It no farther revokes a will, than as it is in opposition to some particular dispositions of it; but a second will revokes the first. A codicil republishes a will and makes it of the same date with the codicil. 4 Dane, Abr. 550, ch. 127, a 1, § 11, and the authorities cited.

discharge all the mortgages and incumbrances in any wise affecting the real estate and also all other her just debts and funeral expenses ; and to lay out the surplus in stock ; and to pay and apply the clear rents and profits of her real estate, or so much as should not be sold, and the clear annual income and produce of the money arising from the sale after payment of the debts, for the benefit of her friend Joseph Welch for life ; and after his decease to convey, apply and dispose of, all such parts of her real estate and the produce thereof, not sold or applied, to the heirs or heir at law of her cousin William Cockell. The testatrix then gave her family pictures, a worked bed quilt, a pair of sheets and some other articles of personal property, to her heir at law. She gave several legacies to several persons, and 50*l.* to each of her two trustees over and above a reasonable recompense for their trouble, which she directed them to retain out of the trust premises. Then after giving several other legacies she gave 200*l.* to be paid by the said trustees after the decease of Joseph Welch to such person and persons and in such manner and form, as he should by any deed or writing under his hand appoint. All the rest and residue of her personal estate and effects whatsoever not before specifically disposed of she gave and bequeathed to the said Joseph Welch, his executors and administrators, upon trust to pay, apply and dispose of, the same to such person and persons and in such shares, as she should by any writing to be executed by her appoint ; and for default of appointment she gave the said residue to the said Joseph Welch for his own use and benefit ; and she then appointed him executor.

The testatrix died without having made any appointment. The only question was, whether the personal estate not specifically * disposed of or the real estate should be first applied [*108] in discharging the debts.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This is one of those cases, that come so often before the Court, and which have given rise to such difference of opinion upon the Bench, that it cannot be wondered, that I have taken so much time both in this and in *Brummel v. Prothero*, the next cause that stands for judgment, and upon which I confess, if the consideration of the one did not involve that of the other, I should not have taken so much time : but this cause has given me more pain than any other, that ever came before me ; however upon full consideration of the will, and fully subscribing to the principles, that swayed the Court in *The Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, I am perfectly satisfied, this testatrix did intend to give her personal estate to Joseph Welch exempted from the payment of debts. The cases are very numerous ; and great Judges have differed upon them. Some have thought the words sufficient to exempt the personal estate : others have thought, they did not afford that demonstration. The cases are all subjoined by Mr. Cox in a note to the case of *Haslewood v. Pope*, 3. P. Will. 325. I shall not go into the circumstances of these cases. There are certainly many ingredients in this, that seem to have been relied

upon by Judges, who have thought the personal estate not exempt. The circumstance, that the trustees are not the executors, affords a strong inference as to the real intention, and is always favorable to the exemption of the personal estate ; and I desire to have it understood, that though the words " funeral expenses " comprised in this trust occur in some of the cases, and are held not to have any considerable weight, yet that is, where the trust fund is given to the executors, to whom the personal estate is afterwards given : and I cannot but think, that where the trust fund is given with such general words to trustees, who are not the executors, upon whom the funeral expenses would naturally fall, it does afford a considerable argument, that the testatrix did not mean the personal estate to be the fund for all those charges, that naturally fall upon it. The subsequent words of the residuary clause convince me, that she did not mean to give it to him as executor, but as a specific legacy, and exempt from the debts ; for so far from being given to him as executor, and his being entitled to it as such, it is given to him upon trust to dispose of it according to her appointment, and for default of appointment, for his own use ; and then she makes him executor.

I need not state the principles, which have been so often [* 109] * commented on, and are so fully laid down in *The Duke of Ancaster v. Mayer*, that unless there are words, not express, but tantamount to express, so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy and exempt from the payment of debts, it shall be taken subject to them. Great stress was laid in the argument upon the word " residue ; " and it was said, Lord Thurlow in *The Duke of Ancaster v. Mayer* laid great stress upon that word. I think, in that case a great deal of argument did arise from that word, as there applied : but I cannot read this will without giving to the words " rest and residue " a meaning totally distinct from residue after payment of debts ; for those words coupled with the words " not specifically bequeathed " mean only such parts of the personal estate, as are not specifically given ; which alludes to what she had before given to the heir or to the leasehold estates given to the trustees. There are so many shades of difference between *The Duke of Ancaster v. Mayer* and this case, that a thousand arguments might arise in that, that do not arise in this ; and when I read *Walker v. Jackson*, 2 Atk. 624, before Lord Hardwicke, who certainly differed from Lord Talbot, and when I read Lord Thurlow's judgment in *The Duke of Ancaster v. Mayer*, I cannot think, the word " residue " bears upon this case, as it did on that : for there the trustees were likewise executors. The testator gave all his personal estate to the person entitled to the rents and profits of his real estate. It is not given as a residue, as here : but all his personal estate so given he himself afterwards calls by the name of " residue ; " and then, upon which Lord Thurlow very justly laid the greatest stress, and which, I think, put it out of the power of the Court to exempt the personal estate, he nominates the same persons

executors of his will, who were trustees for the payment of the debts; and directs them to discharge his funeral charges and all his debts and legacies as soon as they should become due and payable, as Counsel should advise, and to satisfy themselves out of his personal estate or the trust fund, all disbursements, expenses and charges, they should be put to in proving or in the execution of the will. Lord Thurlow thought it too much to say upon such a gift, the trustees holding both funds, and having an option to pay out of both promiscuously, that the personal estate was intended to be exempt. Great doubts were entertained upon that case at the time, but I most heartily subscribe to it. But Lord Thurlow there says, what has imposed a most grievous task upon the Court, that it is too late to say, express words are necessary. There are many cases determined in favor of the personal estate; which I should have had *great difficulty to acquiesce in. *Adams v. Megrick*, 1 Eq. Ab. 271, is a very weak case.

In *Stapleton v. Colville* the circumstance laid hold of by Lord Talbot does not satisfy my mind; nor does it seem to have satisfied Lord Hardwicke and Lord Thurlow: namely, the mere circumstance of the executor having a power to raise so much out of the term, as would be sufficient for the debts. I have felt great anxiety and difficulty for fear of drawing so nice a line, that Judges can hardly tell how to guide themselves in determinations of this sort. I have looked very carefully at *Walker v. Jackson*; and it must be remembered, that Lord Hardwicke, who determined that case, thought the words not sufficient in *Lord Inchiquin v. O'Brien*, Amb. 33. 1 Wils. 82. In the former he considered all the cases. In applying that case to this I am perfectly satisfied, that if he was right in the consequence, he drew in that case, I am warranted in that, which I have drawn in this. It was upon the codicil, that Lord Hardwicke's opinion turned, as affording a presumption for the exemption of the personal estate: but if the report is right, he did not rest merely upon its being by way of codicil; but thought, that if it had been in the will, it would be a strong case for the exemption of the personal estate. So I think; for the codicil is only part of the will; and it is to be taken altogether (1). This testatrix having given this fund in the largest words to pay all mortgages and incumbrances and all other debts and even her funeral expenses, to persons, who are not those naturally to pay them, gives the rest and residue, not before specifically bequeathed, to the person, whom she makes executor; but not as executor; for she had an intention of appointing it; and then in default of appointment she gives it to him for his own use. Compare those words with *Walker v. Jackson*. I think, I am perfectly warranted in saying, there is demonstration plain, that she did not mean to give it to him as executor, but specifically for his own use and benefit and exempt from the payment of debts. I have had great difficulty; and am much afraid of breaking in upon established

(1) *Crosbie v. Macdoulal*, post, vol. iv. 610.

rules; which I never desire to do. There is a case, which is not reported; and was suggested by me; and deserves some account, to show, that the principles of it are not broken in upon. It is *Gaskill v. Hough*, February 1774; in which I was Counsel. The Court thought the personal estate exempted. That depends upon a very different principle. It was neither a charge for debts, [* 111] nor a devise for payment of debts; for I *am not one of those Judges who think there is much difference, whether it is the one or the other, unless there is demonstration, that the personal estate is intended to be exempted. That case was, not a charge upon the real estate, but an express direction and declaration, that the debts, funeral expenses and charges of probate, should be paid out of the real estate; and the testator then gave his personal estate to his wife, except a leasehold estate in Stockport; which he gave to another. The heir was an infant. The Court has never gone the length of saying, that in such a case the real estate is not particularly appropriated; and from that very appropriation the personal estate is exempt.

Fully acquiescing in *The Duke of Ancaster v. Mayer*, I am perfectly satisfied, that I am warranted in holding, that this personal estate is given to Joseph Welch exempt from the payment of debts (1).

1. SEE the references given in note 3 to the last case, and the second note to the next following case, as to the exemption of personal estate from payment of a testator's debts: and as to the value of the distinction sometimes taken between a bequest of personal estate, either simply, or following an enumeration of articles, constituting items of such a description as to render it improbable that the testator meant them to be applied in payment of his debts; and a bequest of the residue of a testator's personal estate; see *Bootle v. Blundell*, 1 Meriv. 236; where Lord Eldon says, it is a circumstance deserving of just so much weight as, and no more than, any individual judge can, after attending to the general effect of the will in all its parts, taken together, bring himself to consider it fairly entitled to.

2. That a codicil and a will previously made, if not inconsistent with each other, are to be considered as parts of the same instrument; see note 3 to *Hill v. Chapman*, 1 V. 405.

3. The principal case was commented upon in *Aldridge v. Lord Wallscourt*, 1 Ball & Bea. 317, and the decision was said to have depended upon something very particular in the will, which took the case out of the general rules as to exoneration. See *Greene v. Greene*, 4 Mad. 159.

(1) See the preceding and the two following cases, and the note, *ante*, 106.

BRUMMEL v. PROTHERO.

[ROLLS.—1795, DEC. 16; 1796, JULY 27.]

To exempt the personal estate under a devise for payment of debts the intention must appear plainly on the will; and the Court cannot look to extrinsic circumstances. (a)

JOHN BLEWITT devised all his manors, messuages, lands, tenements and hereditaments, and all his real estate, whatsoever and wheresoever and of what nature and kind soever, in possession, reversion, remainder or expectancy, with their and every of their appurtenances, unto Thomas Prothero and his heirs, to, for and upon the several uses, ends, intents and purposes, hereinafter limited, expressed and declared, of and concerning the same: that is to say, in trust in the first place to pay all his just debts: and also to and for the use, intent and purpose, that his mother Mary M'Namara and her assigns should after his decease receive out of all and every his said manors, messuages, lands, tenements and hereditaments and real estate, an annuity or rent-charge of 120*l*. and also to and for this farther use, intent and purpose, that his four sisters of the half blood then living and their assigns should from and immediately after the decease of the survivor of him and his mother during their respective natural lives have, receive and take, out of all and every the said manors, messuages, lands, tenements, and hereditaments and all his real estate, an annuity or rent-charge * of [* 112] 200*l*. in equal shares and proportions; with power to his mother and sisters to enter and distrain and take the rents, issues and profits; and as to, for and concerning, all and every the said manors, messuages, lands, tenements, hereditaments and real estate, with their and every of their appurtenances from and immediately after his decease charged and chargeable with the payment of the said annuities or rent-charges of 120*l*. and 200*l*. as aforesaid, and subject thereto, and to the means and remedies herein-before provided for the recovery thereof, to the use of his brother Edward Blewitt and his issue in strict settlement; remainder to the use of his half brothers John and Michael M'Namara and their issue successively in the same manner; remainder to the use of his said sisters and their heirs, as tenants in common; and he directed his said brothers of the half blood and their issue, when in possession, to take the name of Blewitt. Lastly, he gave and bequeathed unto his said brother Edward Blewitt all his moneys, goods, chattels, rights, credits, personal estate and effects, whatsoever and wheresoever; and he appointed his said brother sole executor.

The bill was filed by bond creditors; and the question was, whether the real or the personal estate should be first applied in discharge of the debts?

(a) See, *ante*, p. 107, note to *Burton v. Knowlton*, and note (a) to *Kidney v. Coussmaker*, 1 V. 436.

Mr. Stanley, Mr. Richards, Mr. Thomson, and Mr. Hubbersty, for the Executor. This is stronger than *Walker v. Jackson*, 2 Atk. 624, being for payment of all debts. The testator must have intended a benefit by the gift of the personal estate. It is too much to say, that by construction of law only the personal estate thus given shall be applied in exoneration of another fund, which is expressly charged. In *Webb v. Jones*, 2 Bro. C. C. 60, the Master of the Rolls observes, there is no magic in words. *Samwell v. Wake*, 1 Bro. C. C. 144, was only a general charge upon all his estate, not using the word "real"; and the personal estate was given as a residue. The circumstances of *French v. Chichester*, 1 Bro. P. C. 192, and *The Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, are also distinguishable. *Bamfield v. Wyndham*, Pre. Ch. 101. *Stapleton v. Colville*, For. 202. *Anderson v. Cook*, *Kynaston v. Kynaston*, cited 1 Bro. C. C. 456, 457. The intention must be collected, as in every case, from the words; unless we can go out of the case and see the

[*113] *quantum of the property.* *The testator could not give all his personal estate, if his debts were to be taken out of it.

Mr. Graham, Mr. Lewis, and Mr. Alexander, for the Devisees in remainder. There is nothing to imply an intention to exempt the personal estate. *Samuel v. Wake*, *The Duke of Ancaster v. Mayer*, and *Hone v. Medcraft*, 1 Bro. C. C. 261, have furnished the rule, that there must be express words or an inference, that cannot deceive, absolutely irresistible and necessary. It cannot be picked out of little circumstances. In *The Duke of Ancaster v. Mayer*, Lord Thurlow wished, the Court had held express words necessary, as a rule of policy. Any view of the amount of the property will not do, *Andrews v. Emmot*, 2 Bro. C. C. 297.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I shall not determine it now. I will look at the will very carefully: but I will state the principles, that will guide my determination. First, I will not look out of the will as to the state of his affairs. I shall not be guided by the consideration, whether he could or could not under certain circumstances have intended what might or might not have been inferred from the same will under other circumstances. Secondly, as to the irresistible inference: I do not know what is meant by that. I admit, it must be such an inference, as leaves no doubt upon the mind of the person, who is to decide upon it. It must be irresistible to my mind (1). It need not be such, that no man alive can doubt upon it: but it must not be a case of presumption; for then we shall get into that miserable way of explaining it by evidence. It is not like the case between the executor and next of kin, where the residue is not disposed of; which, I say, is only whether the testator did or did not upon the whole intend at the time, that the executor should take it. That may be explained by evidence: this cannot; but must stand upon the will. There are, I am sure, cases upon these words: "I will, that all my debts shall be paid out of my real es-

(1) See Lord Eldon's definition of necessary implication, 1 Ves. & Bea. 466, and in the note, *post*, vol. v. 534.

tate." That, I take it, was determined to lay it upon the real estate only. There was a case of *Gaskill v. Hough* (1) in the Exchequer, when I was very young at the bar; in which the words were something like those. This is a case, which cannot very unfrequently have happened. I must be perfectly satisfied, before I decide, that the personal estate is exempted. In *The Duke of Ancaster v. Mayer* the Lords Commissioners were satisfied: Lord Thurlow was not; and he said, nothing but absolute satisfaction should induce him to exempt the personal estate. Irresistible *in- [*114]ference is not necessary even in the case of an heir at law.

In the known case of a devise to the heir after the death of the wife the inference is not irresistible: if it is to a stranger, there is no inference.

MASTER OF THE ROLLS. My determination in this case is directly the reverse of the last; for I am clearly of opinion, it is not sufficient to exempt the personal estate from the debts. I have looked very attentively at the will, that the party should not think it a hard determination, because different from the last. There is a very wide difference between the two cases. This is stripped of every circumstance except that of a devise to a trustee for payment of debts and a general bequest of the personal estate to the executor. There is no one case since *French v. Chichester*, the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has been over and over again decided, that such words are not sufficient to raise such a demonstration, as Lord Thurlow says is necessary (2).

1. As to the exemption of a testator's personal estate from the discharge of his debts, see note 1 to the last preceding case, and note 3 to the last case but one; with the references there given.

2. That, as a general rule, a testator is never to be understood as having meant more than he has expressed; but still, that in endeavoring to ascertain the meaning of a testator, when that meaning is not clear, the improbabilities and inconsistencies which may arise out of one construction, or be avoided by another, are to be attended to; see note 4 to *Blake v. Bunbury*, 1 V. 194; the note to *Smith v. Maitland*, 1 V. 362; note 2 to *Stratton v. Best*, 1 V. 285; and note 4 to *Standen v. Standen*, 2 V. 589.

3. Although a testator has not by express words exonerated his personal estate from those charges with respect to which they are primarily liable; yet this exoneration may be necessarily implied. *Greene v. Greene*, 4 Mad. 157; *Williams v. The Bishop of Llandaff*, 1 Cox, 257. The implication is, unquestionably, not to rest upon conjecture, (*Cave v. Holford*, 3 Ves. 676,) but neither is it required, that the inference should be absolutely irresistible; it is enough if the whole circumstances, taken together, afford such an inference as leaves no doubt in the mind of the judge who has to decide, as to the intention of the testator. *Hartley v. Hurle*, 5 Ves. 546; *Boole v. Blundell*, 19 Ves. 517; *Gittins v. Steele*, 1 Swanst. 28; *Wilkinson v. Adam*, 1 V. & B. 466. See note 2 to *Hamilton v. Worley*, 2 V. 62. In the case of *Lloyd v. Abrahall*, decided in Canc. 18 June, 1754, (which case is cited more at length, *post*, in note 2 to *Holmes v. Cradock*, 3 V. 317,) Lord Hardwicke appears, from Mr. Forrester's ms. to have expressed himself to the following effect:—"It has been argued, that according to *Gardner v. Sheldon*, Vaugh. 262, although estates are often given in a will by implication, this distinc-

(1) See that case stated in the preceding case, *ante*, 110.

(2) See the two preceding cases and the next, and the note, *ante*, 106.

tion is to be taken, namely, that an estate given by implication of a will, if it be to the disinherison of the heir at law, is not good, when such implication is only constructive and possible, but not a necessary implication: this is, undoubtedly, the doctrine laid down in that case, but I do not see that it is said there must be an absolute natural necessity, where the intent is plain, and the implication of law thereon." See, on this subject, note 6 to *Pickering v. Lord Stamford*, 2 Ves. 272. In Mr. Forrester's before-cited ms. the case of *Howell v. Hayler*, (which was decided on the 8th of February, 1747,) is thus stated: — Thomas Hayler bequeathed several pecuniary legacies, and then gave all the rest and residue of his real and personal estate to his brother and his heirs. The brother was the testator's heir at law, and the question was, whether the legacy was a charge on the real estate. Lord Hardwicke said, "The terms of the will are not sufficient to charge the legacies on the real estate. It would be dangerous to carry implied intents so far, where nothing more appears to warrant the presumption of such intent. No case has been cited to warrant such a decree, founded only on the circumstance of the devise being to the testator's heir at law."

MANNING v. SPOONER.

[ROLLS.—1796, MAY 12; JULY 27.]

THOUGH a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended: but this arrangement does not bind the creditor. (a)

The order of application to debts: 1st, the personal estate, unless exempted expressly or by plain implication: 2dly, estates devised for the particular purpose of paying debts: 3dly, estates descended: 4thly, estates devised, (b) [p. 117.]

CHARLES SPOONER by his will, dated the 14th of January, 1785, after some specific and pecuniary legacies gave all the residue of his personal estate to trustees, in trust to convert the same into money, and thereout in the first place to pay all his debts and funeral expenses, and also the legacies therein mentioned; and if there should be any surplus of the moneys to arise, from his said personal estate, he directed, that it should be laid out in the purchase of 3 per cent. consolidated Bank Annuities upon the trusts after declared. He gave all his messuages, plantations, lands, tenements, and hereditaments, and all his real estates whatsoever, whether in possession, reversion, or remainder, situated in the islands of Antigua, St. Christopher's and Tortola, together with all the buildings, slaves, horses, mules, cattle, and plantation utensils, and implements, and chattels of all sorts, therein or thereunto belonging, to the use of the said [* 115] trustees, their heirs, executors, administrators and * assigns,

(a) See *ante*, p. 106, note (a) to *Burton v. Knowlton*, and note (a) to *Kidney v. Cousmaker*, 1 V. 436. The doctrine of the Court in cases like the present is to follow out the intention of the testator. The personal estate is deemed the natural and primary fund for the payment of all debts; and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention. 1 Story, Eq. Jur. § 572; see, also, *Lupton v. Lupton*, 2 Johns. Ch. 628; *Livingston v. Newkirk*, 3 Johns. Ch. 319; *M'Kay v. Green*, ib. 56; *Hays v. Jackson*, 6 Mass. 151; note (a) to *Kidney v. Cousmaker*, 1 V. 436.

(b) See 1 Story, Eq. Jur. § 577.

upon trust, that they should during the life of his wife, and until the sum of 8000*l*, 3 per cent. consolidated Bank Annuities should be raised, as after directed, and also till such farther sum should be raised, as after mentioned, cultivate and manage, and receive the rents, issues and profits, of the said plantations and estates, and apply the same, after paying and securing some annuities therein mentioned, in payment of such of his debts and legacies, as the residue of his personal estate should prove deficient in paying; and should lay out and invest the residue and surplus of the annual rents and profits of the said estates and premises from time to time in the purchase of 3 per cent. consolidated Bank Annuities in the names of his said trustees, until the said Bank Annuities together with the Bank Annuities (if any), which should be purchased with the surplus of his personal estate, should amount to the sum of 8000*l* 3 per cent. consolidated Bank Annuities; and subject thereto, and after the death of his wife, he directed, that his trustees should convey the said plantations, estates and premises, in the islands of St. Christopher's and Tortola to the use of his nephew Hungerford Spooner and his issue male in strict settlement with divers remainders over; and he directed them to convey his said plantations, estates and premises, in Antigua, to the use of his nephew Peter Shawe and his issue male in the same manner with divers remainders over; and he declared, that all the negroes, cattle, stock, plantation utensils and implements, on and belonging to the said several estates should go along with the freehold and inheritance of the said estates respectively. He gave 1000*l*. part of the said 8000*l*. 3 per cent. annuities to his niece Mary Shawe, and the remainder of the said 8000*l*. stock to several other nephews and nieces; and he appointed his trustees executors with his wife.

The testator at the date of his will was not seised of any real estates except those, he had devised. Afterwards in August, 1787, he purchased in fee simple an estate at Landford, in Wilts. He died upon the 12th of May, 1798, leaving his niece Isabella Spooner his heir; who, the will not having been republished, entered upon the estate at Landford; and sold it for 4200*l*.

The widow and one of the trustees being dead, the will was established and the usual accounts directed upon the bill of the surviving trustee. A supplemental bill was afterwards filed by the surviving trustee, the devisees and legatees, praying an account of the rents *and profits of the Landford estate received by [* 116] the Defendant Isabella Spooner and of the purchase-money; and that in case the specialty creditors should have exhausted any part of the personal estate, the legatees might stand in their place upon the real estate descended. The purchase-money of the Landford estate was paid into Court. It was decreed, that the accounts should be carried on in the original cause. The Master reported, that 5047*l*. had been received from the personal estate, and applied in discharge of debts and legacies; and that 9739*l*. remained due to the specialty creditors for principal and interest. The

cause coming on for farther directions, the question was, whether the descended estate was liable to the debts before the application of the fund to arise from the devised estates under the trust in the will?

Mr. Piggott and Mr. Thomson, for the Devises. In *Galton v. Hancock*, 2 Atk. 424, Lord Hardwicke changed the opinion, he had first taken up in favor of the heir. *Powis v. Corbet*, 3 Atk. 556 (1). The circumstance, that the descended estate was purchased after the date of the will, is material; in the other case devising one estate subject to debts and suffering the other to descend he might be supposed to mean the latter to be exempt. *Davies v. Topp*, *Wride v. Clark*, 2 Bro. C. C. 259, n. 261, n. It is very difficult to reconcile Lord Thurlow's opinion in *Davies v. Topp* with his opinion in favor of the heir in *Donne v. Lewis*, 2 Bro. C. C. 257. This testator knowing, that his estates in the West Indies were liable to all his debts generally, both by colonial acts and the statute 5 Geo. III. c. 7, has expressed his intention, that they should not be sold for that purpose. This will amounts to no more than a general charge, and makes no special provision.

Mr. Lloyd, Mr. Grant, and Mr. Allcock, for the Heir. In *Donne v. Lewis*, Lord Thurlow was clearly against extending the doctrine of the preceding cases. He never was satisfied with *Galton v. Hancock*; under the circumstances of which it certainly was extraordinary to infer an intention to exonerate the devised estate. Where the estate is purchased after the date of the will, as strong an infer-

(1) Corbet Kynaston by his will subjected his real estates to the payment of his debts; and devised all his real estates to trustees, their executors and administrators, for the term of 500 years, in trust for the speedy, effectual, and just, payment of the annuities charged upon his estate, and the interest money due to the several mortgagees thereof and the charges of the execution of the trust, in manner therein mentioned; and as to the overplus of the said yearly rents, he declared his will to be, that the same should be set apart and esteemed as a sinking fund for the yearly and gradual discharge of the principal money of his said debts, namely, for the discharge of bond debts and debts by simple contract in the first place, and the mortgage debts, to be so discharged yearly and gradually one after another with all convenient speed, until the whole debts should be fully paid off and discharged; and that then such overplus money should be put out at interest to increase the fund. He then gave power to the trustees to sell timber or other wood on any part of his estate, and to make leases for three lives and to take fines thereon; which money so to be raised by sale of timber, leasing and fines, he directed to be applied to increase and augment the sinking fund; with this proviso; that if any of the creditors should call in their respective debts, and his trustees could not raise the same by the ways and means aforesaid, or by assignment of such respective creditor's securities, then and so often it should be lawful for his trustees to sell and dispose of to the best advantage all or any part of the said term of 500 years for payment of such debts, as could not be raised by any other the ways and means aforesaid; and if any overplus should arise from such sale, he directed it to be applied to increase the said sinking fund; and he directed his trustees to avoid selling, if possible, and not to put this power in execution but in cases of the last and greatest necessity, where justice and his creditors absolutely required it; and not otherwise; and after the determination of the said term of 500 years he devised his said estates in strict settlement to Anna Maria Mytton and her issue male with remainders over. The descended estate was purchased between the date of the will and the date of a codicil, which republished the will. Reg. Lib.

ence for the heir arises from its not being republished as in the other case. There cannot be a more particular direction than that, till the debts are paid, the devisee for life shall have nothing out of the estate; and though a general charge will not do, a particular trust will. Here, knowing his estates were liable to all his debts, he had no other motive for the charge than to create a particular special fund. This was at first an extremely doubtful equity. In the cases cited there was a mere general charge.

July 27th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The question, whether the descended estate is liable before those devised, depends entirely upon this point, whether there is a specific gift (1) of any part of the estate for the purpose of paying the debts; or whether it is only a general charge for that purpose; for upon the doctrine, that is very fully laid down by Lord Thurlow in *Donne v. Lewis*, there is no doubt of the manner in which the estate of a testator is to be applied in discharging his debts. That case had a very full consideration and discussion; and it was determined upon principles, that have been constantly acted upon since; and which must govern all such cases. From that I collect, that there are four classes of estates to be applied to the debts: 1st, The general personal estate, unless exempted expressly or by plain implication: 2dly, Any estate particularly devised for the purpose, and only for the purpose, of paying debts: 3dly, Estates *descended: (2) 4thly, Estates specifically devised. The [*118] question therefore is in every case, where the contest is between an estate descended and an estate alleged to be provided for the debts, whether it is a general charge, or any part of the estate is selected (3) for the express purpose of paying the debts. If part is selected for that purpose, that part shall be applied before the descended estate; whether the testator had that estate before he made his will, or not. Lord Thurlow, in considering *Galton v. Hancock*, *Wride v. Clark*, and *Davies v. Topp*, is clearly of opinion, that the question is, whether the testator has selected any part of his estates, which it was his will should be first applied; or whether the charge is only to subject his estates to the payment of his debts; which otherwise perhaps could not be applicable to them. That will not make the devised estates applicable in the distribution before those descended.

Then taking this case for my guide I am only to consider, which is the case here; whether it is a general charge, or part is selected and appropriated to the debts; and the words are so emphatical as fully to convey the principles, that will guide the decision; especially when we consider the nature of this property; which is situated in the West Indies; and is liable to all his debts independently of any

(1) See *post*, vol. viii. 116, 117, 125; *Harwood v. Oglander*; and 303, *Milnes v. Slater*.

(2) *Barnewell v. Lord Camdor*, 3 Madd. 453.

(3) *Post*, *Williams v. Chitty*, 545; vol. viii. 116, 117, 303.

will of his (a). But even if it was an English estate, which is not liable to all debts, even in that case I should have thought, that a provision of this sort appropriating the rents and profits first to the payment of his debts, is a specific gift, which must be first applied. I cannot consider this as being a general charge for the purpose only of preventing any of his debts remaining unpaid; for the law of the country, where they lie, had sufficiently provided for that; therefore if it is to have any effect, it must be to appropriate this fund, and for no other purpose. If so, the question is, whether according to the principles laid down in *Donne v. Lewis*, the Plaintiffs have a right to call upon the heir, to whom the estate purchased after the date of the will has descended, to apply that estate first to the debts; and I am of opinion, the heir cannot be called upon to contribute, till that fund, so appropriated, not merely to take care that all the debts shall be paid, but for the particular purpose of the appropriation, has been exhausted. The heir cannot avail herself of this except by being reimbursed out of the rents and profits of this trust fund. She cannot postpone the creditors. That was the case of *Lingard v. Lord Derby*, 1 Bro. C. C. 311. The testator may arrange between his heir and devisee; but not so as to [*119] take away from *the creditor a fund, he has a right to come upon (1). But if creditors are not concerned, the Plaintiffs have no right to call upon the heir; and the money must be paid to her; and the supplemental bill must be dismissed (2).

WHERE the special object of a devise of particular lands was the payment of the testator's debts, there such lands are the primary fund for that purpose. *Harmood v. Oglander*, 18 Ves. 125. But though lands may have been devised subject to a general charge for payment of debts, still, lands descended will be previously applicable. *Milnes v. Slater*, 8 Ves. 306. The devised estate will be considered as auxiliary only, unless the descended estate be expressly exonerated *Barnewell v. Lord Cawdor*, 3 Mad. 456.

(a) It was always held, even before the stat. Geo. II. c. 7, § 4, that a foreign plantation, though an inheritance, yet being in a foreign country, was to be looked upon as a chattel to pay debts, and a testamentary thing. 2 Williams, Exec. 1183. In England an action did not lie formerly against an executor, upon a simple contract; but now by 3 & 4 Wm. IV. cap. 42, § 13, "an action of debt on simple contract shall be maintainable in any Court of Common Law against any executor or administrator." Ibid. 1371. This reasonable change in the law, when proposed by Sir Samuel Romilly, was rejected; but was finally carried through Parliament by his son, Mr. John Romilly, of the Chancery Bar, in 1834.

(1) See *Hughes v. Doulsen*, 2 Bro. C. C. 614.

(2) See the three preceding cases: *post*, *Harmood v. Oglander*, *Milnes v. Slater*, vol. viii. 106, 295.

TAYLOR v. LANGFORD.

[ROLLS.—1796, APRIL 27.]

TESTATOR gave the interest and produce of the residue to his two sisters for their lives; and after their decease the principal to be paid to their children, share and share alike: but whichever died before the other, then the share so paid to her to be paid to her children in equal proportions: but if she should leave no children, then the interest and produce to be paid to the survivor for her life as aforesaid. One sister died without leaving children: the survivor is entitled to the interest for life; and the principal is vested in all her children. (a)

—— **DRAPER** by his will, after directing his debts to be paid, and giving some specific articles to his wife, ordered all the residue of his estate to be turned into money, and after making a provision for his wife for her life, directed the interest and produce thereof to be paid to his two sisters Hannah Langford and Alice Cheeseman share and share alike during the term of their natural lives; “and after their decease the principal to be paid to their children share and share alike: but whichever sister died before the other, then the share, which was so paid to her, shall be paid to her children in equal proportions: but if such sister so dying should leave no children, then the interest and produce to be paid to the survivor for her life as aforesaid.” The testator then appointed executors.

Alice Cheeseman died without leaving children. Hannah Langford had two children at the death of the testator, and two others afterwards: but Mary Taylor the Plaintiff was her only child living at her death; and the question was between her claiming the whole in that character and the assignees of the shares of two of the other children. Under former orders in the cause the interest was ordered to be paid to Hannah Langford for her life.

Mr. Lloyd and **Mr. Scaife**, for the Plaintiff. The time of vesting was suspended until the death of the survivor of the sisters upon the particular circumstances. The words “leave no children” must mean at her death. It is clear, the testator had in his idea, that if either left no children living at her death it was to go over; and then according to *Spencer v. Bullock*, (*ante*, Vol. II. 687,) it could not be a vested interest in children then living or coming *en esse* in the life of the tenant for life. Till the death of the mother it was impossible to know what children she might leave. There must be * the same conclusion upon both shares, [* 120] both being given in the same words and sentence. This is an exception from the general rule in favor of vesting.

Mr. Cox and **Mr. Johnson**, for the assignees of two of the other children. The general rule is established by *Attorney General v. Crispin*, *De Visme v. Mella*, and 1 Bro. C. C. 386, 537, and many other cases, and was admitted in *Spencer v. Bullock*. There are no circumstances in this case as in that. The first words completely

• (a) See 2 Williams, Exec. 799, 892; *Shattuck v. Stedman*, 2 Pick. 468.

dispose of the property after the decease of the two sisters, by words that clearly give it to all the children ; and there is nothing to undo that in the subsequent expressions ; which are only applicable to the life interests of the two sisters, and do not touch the principal.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. I cannot control these general words by this strange expression ; for the consequence of that construction would be, that though there might have been many children, yet if the surviving sister died without leaving any children, it would be undisposed of. The principal reason in *Spencer v. Bullock* was, I think, that there were three children at the death of the testator, and he makes a disposition of it in the event of there being only one child. Therefore I held the time of vesting suspended. This property vested in the children (1).

As to the vesting of interests in remainder, given to the children of a family, after a previous life estate ; see, *ante*, note 3 to *Roebuck v. Dean*, 2 V. 265.

BRYDGES v. BRYDGES.

PHILIPS v. BRYDGES.

[ROLLS.—1796, APRIL 27 ; MAY 3.]

A LIMITATION that will create an intail at law, will have the same effect upon an equitable estate : therefore a devise in fee to pay debts, and then to the use of A. in trust for B. for life, remainder to the heirs male of his body, is an estate tail in B. (a)

To create a merger of the equitable in the legal estate by their union, the interest in each must be the same ; (b) an equitable recovery therefore barred an equitable remainder in tail, in the person, who had the whole legal fee, [p. 120.]

An equitable recovery will not bar a legal remainder, [p. 125.]

A legal estate in the equitable tenant to the *præcipe* is no objection to an equitable recovery, [p. 125.]

Analogy between legal and equitable estates, [p. 127.]

WILLIAM BRYDGES devised and bequeathed all his estates freehold and leasehold and copyhold at Bosbury and several other places mentioned in the county of Hereford, and also all the estates freehold lands and premises, which were given to him by his cousin Thomas Brydges, in the counties of Hereford, Brecon and Radnor, then in possession of Arthur Holder and Francis Johnson, to his

(1) See the note, *ante*, vol. i. 408.

(a) The like limitations may be made of the equitable as of the legal estate ; 1 Preston, Abstr. 144 ; 1 Chitty, Gen. Pr. 324. As to the distinctions between legal and equitable estates, see *ib.* 365—373. A trust estate, and the legal interests of a mortgagee in fee, and equitable interests, as well as legal, in general including an Equity of redemption, are clearly devisable, and will pass under the general words in a will passing other estates, unless a contrary intention can be collected from the testator's expressions. *Ib.* 355, 369.

(b) See 1 Maddock, Ch. 509.

wife, Catherine Brydges, Edmund Brydges, Francis Brydges, and Kempe Brydges, to have and to hold to them and their heirs to the use of them and their heirs in trust and confidence, that they and *the survivor and the heirs of such survivor [*121] should out of the rents, issues and profits, or by sale, mortgage or other disposition thereof, raise so much money as would pay off the several mortgages, the premises were subject to, and also all his debts, that he owed upon bond or other securities mentioned in a paper enclosed in his will; and after payment of all his debts he directed his said trustees to convey his estates and premises, that should be left unsold, to such person and persons, to whom he had devised his estates at Tiberton; and he devised to his wife his estates freehold, leasehold and copyhold, at Tiberton and other places mentioned in the county of Hereford, the copyhold being surrendered to the use of his will, to have and to hold the said manors, messuages and premises, to her for and during the term of her natural life, subject to waste, for her better provision and maintenance; and he devised some estates given him by the late Dr. Bruster, in the city of Hereford, to his wife, to have and to hold for and during the term of her natural life; and after her decease he devised the same to such person and persons, to whom he had devised his estates at Tiberton; and from and after the decease of his wife he devised and bequeathed the aforesaid estates at Tiberton freehold, leasehold and copyhold, to Edmund, Francis, and Kempe Brydges, to hold to them and their heirs to the use of them and their heirs in trust and confidence, that they should collect, receive and take, the rents, issues and profits thereof, and apply the same every year in the paying of his debts and mortgages, and in paying the sum of 4000*l.* to his two grandchildren Catherine and Anne Brydges, to be equally divided between them after all his debts were paid off; if they were not paid off by his grandson, to whom he had left his estates; and from and after the payment of all his debts either in manner, as before directed, or by the persons, who should be in possession of his real estates according to his will, he gave, devised and bequeathed the said estate at Tiberton and premises aforesaid to the said Edmund Brydges and his heirs, to hold the same to him and his heirs, to the use of him and his heirs, in trust nevertheless to and for the several uses and purposes following: that is to say; to the use of his grandson Francis William Thomas Brydges during his natural life: and after his decease to the use of the heirs male of his body lawfully issuing; and for default of such issue to the use and behoof of the said Edmund Brydges, eldest son of his late uncle Edmund Brydges, and the heirs male of his body lawfully issuing; and for default of such issue, to the said Francis Brydges, second son of his said uncle, and the heirs male of his *body lawfully issuing, and for default of such issue to [*122] Kempe Brydges and the heirs male of his body lawfully issuing, and for default of such issue to his son in law Edmund Brydges, second son of his uncle Marshall Brydges, and the heirs

male of his body lawfully issuing ; and for default of such issue to the use of his own right heirs for ever. After giving several legacies, the testator gave all his personal estate to his wife, and appointed her sole executrix.

By two codicils the testator taking notice of the death of his wife since he had made his will gave some directions to be followed during the minority of his grand-son, and appointed Kempe Brydges and another executors.

The testator died in 1764 ; and the executors having renounced, administration with the will annexed was granted to his grand-daughters Catherine Brydges and Anne Griffith. Francis William Thomas Brydges by his next friend filed a bill to have the trusts of the will carried into execution ; and by the decree in 1765 the will was established, and directions were given for taking the accounts and paying the debts by sale of the trust estate, if necessary ; and that if any part should remain unsold after payment of the debts, it should be conveyed to the uses directed by the will. No farther proceedings took place in that cause. Upon the 30th of January, 1772, Francis William Thomas Brydges attained the age of twenty-one ; and the trustees under the will having sold part of the estates for payment of the debts put him in possession of the rest : but no conveyance of the legal estate was executed. In February, 1772, and December, 1780, Edmund and Francis Brydges, two of the remaining trustees and devisees in tail in remainder under the will, died. By lease and release dated the 18th and 19th of January, 1785, all the devised estates were conveyed by Francis William Thomas Brydges to Joshua Peart in fee, in order to make a tenant to the *præcipe* ; and in Hilary Term, 1785, a recovery was accordingly suffered to the use of Francis William Thomas Brydges, his heirs and assigns for ever. Kempe Brydges the only surviving trustee, in whom the legal estate was vested, did not join in this transaction. Upon the marriage of Francis William Thomas Bridges in July, 1785, part of the said estates was settled upon him for life ; remainder to trustees to preserve contingent remainders ; remainder to trustees to secure a jointure and raise portions ; remainder to the first and other sons of the marriage successively in tail male ; remainder to the

[* 123] * husband and the heirs of his body by his intended wife ; remainder to him in tail general ; remainder to him in fee.

Francis William Thomas Brydges by his will, dated the 10th of March, 1788, devised the unsettled estates, subject to certain incumbrances, and also the settled estates, in case he should die without issue male, to his wife for life ; remainder to his daughter Anne in tail ; remainder to his two sisters Catherine and Anne in fee. He died, leaving three daughters and no issue male. Kempe Brydges died in 1792.

A bill was filed by the surviving trustees in the marriage settlement of Francis William Thomas Brydges, his widow, and three infant daughters by their next friend, praying, that the proceedings in the former cause might be prosecuted ; and that the Defendant Kempe

Brydges, only son and heir at law of the surviving trustee in the will of William Brydges, might be decreed to convey the estates settled by the deeds of July, 1785, to the uses and trusts of those deeds, and to convey such of the estates of the testator William Brydges, as were sold, to the use of the purchasers, and the residue of the said estates to the uses of the will of Francis William Thomas Brydges.

The Defendant Kempe Brydges by his answer insisted, that by the union of the equitable and legal estates in his father he had a legal remainder in tail in the estates, whereof the recovery was suffered; and therefore such remainder was not barred for want of a legal tenant to the *præcipe*.

The former decree was afterwards ordered to be carried on; and it appeared by the report, that all the debts and charges were paid.

Mr. Lloyd, Mr. Grant, Mr. Richards and Mr. Romilly, for the Plaintiffs. There is no doubt upon *Bale v. Coleman*, 1 P. Will. 142, that by the limitation to F. W. T. Brydges for life, with remainder to the heirs male of his body, no trustees being interposed, he took an estate in tail male. According to *Bagshaw v. Spencer*, 1 Ves. 142. 2 Atk. 570, and many other cases, the legal estate being given to the trustees in the most ample words, and the purpose requiring, that they should have the whole fee, the subsequent estates are equitable only; and it is still clearer as to the Bosbury estate; for * that was mortgaged (1); and therefore the deviser had [* 124] only an equitable interest to devise. The equitable recovery therefore by an equitable tenant in tail barred all remainders in their nature equitable, and therefore the remainder in tail to Kempe Brydges. In *Champernoon v. Williams*, 2 Ch. Ca. 63, 78. 1 Vern. 13, the same argument from the union of the estates might have been used; for the reversion in fee in equity was in the trustee. *Baskett v. Pierce*, 1 Vern. 226 is strong; for there was only a fine. *Robinson v. Cummings*, For. 164. 1 Atk. 473, cannot be distinguished from this. *Boteler v. Allington*, 1 Bro. C. C. 72. *Salvin v. Thornton* in a note to that case, 73, and Amb. 545, 699, has no analogy to this; the estate for life being equitable and the remainder legal. 1 Eq. Ab. 256.

Mr. Piggott and Mr. Benyon, for the Defendant. The tenant in tail might at any time before the year 1780, when by the death of the other trustee Kempe Brydges became solely seised, have barred all the equitable remainders. It is clear, no legal remainder can be touched by an equitable recovery. To support that there must be equitable remainders and an equitable tenant to the *præcipe*. *Salvin v. Thornton* is a very remarkable case; for the Master of the Rolls changed his opinion; and the decree was affirmed by Lord Camden. The principle is also confirmed by Lord Thurlow. The equitable and legal estate cannot subsist together in the same person; for he

(1) That did not appear in the pleadings.

cannot be both *cestuy que trust* and trustee for himself: he cannot compel execution of the trust from himself to himself. In *Robinson v. Cummings* there were reasons for keeping the estates separate: 1st, Their union would have destroyed the remainder in its creation: 2dly, It would have discharged the condition, upon which that remainder was given; but this is not a case, where the testator has given legal and equitable estates to the same person, at the time of their creation intending them to subsist together. Here the union results from subsequent accidents. The rule, that the equitable estate shall merge by union with the legal, is universal and without exception: *Goodright v. Wells*, Doug. 771. *Wade v. Paget*, 1 Bro. C. C. 363. Are there any words, by which he could convey the one and not the other? In *Challoner v. Murhall*, ante, Vol. II. 524, an estate tail was merged by union with the fee.

[* 125] *MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN].

This case, which has been extremely well argued, at the same time that it is involved in a great deal of technical learning and some degree of artificial reasoning, does not admit of considerable doubt, if any; and I should have given my opinion upon the close of the argument for the Defendant, if there had been time to give it so much at large, as I thought necessary to obviate consequences being drawn from that opinion, which are by no means involved in it.

The question is clear as to the Bosbury estate, if, as it was said in the argument, there was a mortgage upon it: but I will now suppose, and give my opinion as if the testator had the legal estate, and was seized in fee of the whole estate. I desire it to be understood, that though he calls these estates uses, they are all trust estates. There was no argument against the estate tail of F. W. T. Brydges; and after the case of *Bale v. Coleman*, notwithstanding what was said by Lord Hardwicke in *Bagshaw v. Spencer*, there is no doubt, that he was tenant in tail male in equity. No trustees are interposed; and Lord Hardwicke relied much upon the interposition of trustees in that case; which is not perfectly acquiesced in (1), and in which I do not acquiesce; for I think now the same words, that create an estate tail in a legal estate, will, if applied to an equitable estate, create an estate tail in that. But the Defendant has not contended against his equitable estate tail under these words. The trustees having sold part of the estates for the debts let him into possession of the remainder: but that was not necessary to give validity to the recovery suffered. The objection to the recovery, upon which the question arises, is, that at the time it was suffered the remainder in Kempe Brydges was, not an equitable, but a legal remainder; and therefore according to the doctrine now fully established here, that in order to make a good equitable recovery the remainders must be equitable, and there must be an equitable tenant to the *præcipe*, this recovery is void as to him.

(1) See Mr. Fearn's observations on that case, and *Wright v. Pearson*, Amb. 358. Cont. Rem. 4th edit.

I wish, before I proceed to give my opinion upon the question, whether Kempe Brydges had a legal or equitable estate, to guard against the generality of words. I admit that an equitable tenant to the *præcipe* will not be sufficient to bar a legal remainder; which was the case of *Salvin v. Thornton*: but the converse is supposed, that an equitable remainder cannot be barred, where there is a legal tenant to the *præcipe*. I do not *admit that to the [* 126] length of defeating the recovery, where there is both a legal and equitable tenant to the *præcipe*; for that would take away the right of the owner of the estate, which by the course of the Court is vested in him. It must therefore be understood with this restriction, that if it should happen, that the equitable tenant for life has also the legal estate for life, that is no objection to the recovery; and with that restriction I acquiesce in what is so fully established in *Salvin v. Thornton*. Another position was maintained, in a latitude that would create infinite confusion: that where there is in the same person a legal and equitable interest, the former absorbs the latter. I admit, that where he has the same interest in both, he ceases to have the equitable estate, and has the legal estate; upon which this Court will not act, but leaves it to the rules of law. (a) But it must be understood always with this restriction; that it holds only, where the legal and equitable estates are co-extensive and commensurate: but I do not by any means admit, that where he has the whole legal estate and a partial equitable estate, the latter sinks into the former; for it would be a disadvantage to him (1). All this depends upon the misuse of words.

It has been very ably argued, that there seems an absurdity in saying, he had an equitable remainder for himself, where he had the whole legal fee; but it is much more absurd to say, he had a legal remainder. It is impossible, it would be a solecism to state to a lawyer, that he could have an estate in fee with a remainder in tail expectant in law upon it; but there is no such absurdity in saying, he might have the whole legal estate, and a limited interest in the beneficial interest of that estate. That is the very case here. Kempe Brydges had the whole legal fee for certain purposes, and among the rest, for himself and his heirs male. I have looked into all the cases, that were quoted. It is supposed, that in *Champernoon v. Williams* the reversion in equity was in the trustee: but it does not appear so to me. That case, coupled with *Robinson v. Cummings*, has completely established the point for the Plaintiff; that an estate in fee may exist in trustees, and a partial interest in the beneficial or equitable interest may at the same time subsist

(a) Where the legal and equitable estates in land, being co-extensive, unite in the same person, the equitable is merged in the legal estate, which descends according to the rules of law. *Nicholson v. Halsey*, 1 Johns. Ch. 422; see, also, *Gardner v. Astor*, 3 ib. 53; 1 Maddock, Ch. 457.

(1) *Post*, vol. xviii. 418; *Wykham v. Wykham*; *Merest v. James*, 6 Madd. 118. Upon this distinction Lord Alvanley decided *Williams v. Owens*, *ante*, vol. ii. 595. See the note 606, as to that decision.

and continue for the benefit of the person so seised of the legal estate.

I have no difficulty in saying, that the common sense stripped of all technical and artificial reasons is, that the equitable estate is a mere creature of this Court, and subsists in idea only as to any legal consequences, that might result from the possession of it, [* 127] *but totally distinct from the legal estate. This Court has determined, that such equitable estates are to be held perfectly distinct and separate from the legal estate. They are to be enjoyed in the same condition, entitled to all the same benefits of ownership, disposable, devisable and barrable, exactly as if they were estates executed in the party; and the persons having them may, without the intervention of the trustees or the possibility of their preventing them from exercising their ownership, act, as if no trustees existed; and this Court will give validity to their acts; and when I am told that legal and equitable estates cannot subsist in the same person, it must be understood always with this restriction; that it is the same estate in equity and at law. There is then no person, upon whom this Court can act; and I am amazed, when I read *Goodwright v. Wells*, that it went to law at all. It was a clear case, and cannot bear upon this. I admit, where the person is seised of the estate at law and of the same estate in equity, he cannot have a *subpœna* against himself. There is nothing, upon which equity can act. The equitable estate is absorbed: the better phrase is, that it no longer exists. But when for the purposes of justice it is necessary, it should exist, that circumstance shall not put the party entitled into a worse condition. There is no occasion for a legal estate at all to support a trust estate. Even an heir at law is made a trustee by a Court of Equity. No act of the trustee can prejudice and narrow the title of the *cestui que trust* (1). The argument is; that the trustee happening to become sole owner of the legal estate, something has happened, that takes away from the *cestuy que trust* that interest, which belongs to the nature of the estate he has; and that he cannot suffer a recovery without the intervention of the trustee. The trustee would have said, he would not join; because he would not bar his own remainder. Suppose, a bill had been filed to compel him; and he had died without it; suppose he had died in the Fleet, refusing to do it. In Pig. Rec. 104, there is a quotation extremely well expressed from Lord Nottingham, the father of equity almost, I may say, in this Court. I do not think it possible to put a case, that will narrow what is there laid down. It is impossible to argue, that this is a legal remainder in tail. Either it is totally gone, or it is an equitable remainder. There is another remainder here beyond that to Kempe Brydges.

What is to become of that? Could he by any act of his [* 128] bar or destroy that? Certainly not. The late case * of *Challoner v. Murhall* was mentioned. The very doctrine

(1) *Post*, 341.

is there laid down; and it is clearly corroborative of what is contended by the Plaintiff. The point there is, that the enfranchisement barred the remainders over, because, if not barred that way, they could not be barred any other. He could not bar them by surrender; for he had no copyhold to surrender. He could not bar them at all; therefore the opinion of the Lord Chancellor was, that from that moment he became tenant in fee. *Boteler v. Allington*, I admit, if it proves any thing, is in favor of the Defendant: but there the tenant in tail in equity was alive; and it was no matter to him, provided he made a good title: and the Chancellor's order was, that a conveyance should be made to him. I desire to be understood, that there is no exception to this that a legal remainder cannot be affected by a recovery with an equitable tenant to the *præcipe*; but that the converse is not true; for a legal estate in the tenant to the *præcipe* is no objection. The very point was determined in the famous case of *Marwood v. Turner*, 3 P. Wms. 171; the last point. Sir Henry Marwood upon his marriage articted to purchase lands, which he was to settle upon himself in tail male; remainder to the Plaintiff's father in tail male. He purchased, but did not settle; so that he was tenant in fee; and it was held, that his recovery barred the remainder. This is exactly the point. He was tenant in fee, but was trustee according to the articles. After this I have no difficulty. I have taken the more pains to explain my opinion from wishing a general rule not to be misunderstood or misapplied. I am of opinion, that Kempe Brydges was only trustee for himself in remainder after an estate tail in F. W. T. Brydges; and that the recovery well barred that remainder; therefore the Defendant must join in the conveyances according to the prayer of the bill (1).

1. In *Washbourn v. Downs*, 1 Ch. Ca. 213, it was said, that *Goodrick v. Brown*, 2 Freem. 180, was the first case which recognized the validity of equitable fines and recoveries; a doctrine now abundantly established. That equitable estates are barred by an equitable recovery, if there was an equitable tenant to the *præcipe*, has been long unquestioned; but the report of *Shapland v. Smith*, 1 Brown, 75, though obscure, seems to represent Lord Thurlow as of opinion that an equitable remainder cannot be barred, where the tenant to the *præcipe* has the legal as well as the equitable estate. Mr. Sugden, however, in his learned Treatise on the Law of Vendors, chap. 7, sect. 4, has satisfactorily shown, that this *dictum* is neither supported by principle nor authority; and that, in all probability, Lord Thurlow was misunderstood by the reporter. If any doubt, as to this point, previously remained, it must have been set at rest when the doctrine held by Lord Alvanley in the principal case, was recognized by Lord Eldon in *Wykham v. Wykham*, 18 Ves. 418, in which case it was also declared, that, it is in the power of those *cestui que trusts* who have the substantial equitable interests, to suffer an equitable recovery, whenever there are no other than equitable interests interposed between the legal estate and the ulterior equitable interest; there may be several equitable estates in different sets of trustees, but this will not disable the equitable tenant in tail from suffering a good recovery.

2. An equitable estate merges in the legal estate, only when the same person has a co-extensive interest in each. *Merest v. James*, 6 Mad. 119; *Selby v. Alston*, 3 Ves. 339.

(1) See, as to equitable recovery, *post*, *Burnaby v. Griffin*, 266; *Pigott v. Waller*, vol. vii. 98; *Lord Grenville v. Blyth*, xvi. 224.

3. With respect to the importance of preserving a strict analogy between legal and equitable estates; and applying the same rules to both; see *Cholmondeley v. Clinton*, 2 Jac. & Walk. 148. See, however, a supposed case of exception to this rule, stated, *post*, in note 4 to *Pigott v. Waller*, 7 V. 98.

4. As to the exemption of a testator's personal estate from payment of his debts; see, *ante*, note 3 to *Gray v. Minnethorpe*, 3 Ves. 103, and the several notes to the three cases next thereafter following; with the references there given.

WOODS v. HUNTINGFORD.

[ROLLS.—1795, JULY 13, 15; 1796, MAY 14.]

ESTATE, sold subject to a mortgage, was exonerated in favor of the heir by the personal estate of the purchaser: his acts having clearly made it his personal debt. (a)

Mortgaged estate descends; the mortgagee pressing, the security is assigned: a mere covenant by the heir upon that occasion for payment does not make it his personal debt, (b) [p. 131.]

A mere covenant by the purchaser of a mortgaged estate to indemnify the vendor does not make it his personal debt, [p. 131.]

RICHARD and Alice Huntingford were seised of certain estates for their lives with remainder to their eldest son John in fee. By indentures of the 4th of December, 1758, in consideration of 200*l.*, [* 129] stated to have been paid to Richard, Alice, and John * Huntingford, they mortgaged part of the premises to Carter for 1000 years; and subject to that mortgage conveyed the same to such uses as John should appoint; remainder to Richard for life; remainder to John in fee. A fine was levied; and Richard and John covenanted for payment of the mortgage money. In fact the money was borrowed and applied for the benefit of John only. The mortgagee assigned to Betts; and he in 1763 assigned to Wright; in which transaction all the said parties again joined; 100*l.* more was advanced; and Richard and John again covenanted for payment of the money. By deed of the 23d of February, 1767, reciting, that the money had really

(a) If a man purchases an estate subject to a charge, and does no more than covenant with the vendor, that he shall be indemnified, it does not become his own debt, to be paid out of his personal estate, but it remains a charge upon the estate, or rather a debt of his own, in respect of the estate only; and if nothing more has been done, to take it upon himself, the debt must be paid out of that estate, and not out of his personal estate. 1 Maddock, Ch. 592, and English cases cited. But the party may by his acts, as in the present case, make it a debt of his, if from such acts it can be necessarily inferred that he meant to make it a debt of his own. *Ibid.*

(b) Although the heir should become personally bound to pay the mortgage of his ancestor, yet his personal estate would not be liable to be charged in favor of any person who should derive title by descent under him to the mortgaged premises, subject to the mortgage. For the debt was not originally contracted by him; and it was, as to him, primarily chargeable on the land; and even his covenant to pay the mortgage would only be considered as a security for the debt. 1 Story, Eq. Jur. § 576, and English cases cited; *Cumberland v. Codrington*, 3 Johns. Ch. 229; 4 Kent, Comm. 420, 421, (5th ed.)

been borrowed for the benefit of John, that he had covenanted with his father and mother to indemnify their life-estates from these several mortgages, that no interest had been paid for the said 300*l.* by the said John Huntingford or John Bullen, the trustee, but all the interest accrued from the mortgage to Wright was still in arrear, and that John Huntingford, being desirous to be discharged as well from the payment of the principal sum of 300*l.* as the arrear of interest, and all that should grow due, which arrear and growing interest, he apprehended, would with the said principal sum before the death of Richard and Alice Huntingford, or before the said John should come into possession of the mortgaged premises, amount to the value of the fee-simple thereof, had applied to Richard Huntingford to take upon himself the payment of the same, and to save harmless him, John Huntingford; and that in consideration thereof, he would convey and assure all his right, title and interest in the premises to Richard Huntingford and his heirs, the said estates were conveyed with all the usual covenants from John for farther assurance and indemnity; and Bullen, the trustee, was directed to stand seised to the use of Richard; who covenanted to pay all the arrears due upon the mortgage. Richard Huntingford afterwards borrowed a farther sum of 40*l.* from Wright, and made a new mortgage to him for the whole sum of 340*l.*

Upon these facts the question was between the heir and the younger children, whether the mortgaged premises were to be exonerated by the personal estate of Richard Huntingford. The cases cited were from Mr. Cox's collection in the note to *Evelyn v. Evelyn*, 2 P. Wms. 664, and *Hamilton v. Worley*, ante, Vol. II. 62 (1).

May 14th. MASTER OF THE ROLLS [SIR RICHARD PEP-
PER ARDEN.] *This is one of the most doubtful questions, [* 130]
I have ever had to determine. When it is stated, it will
occur to every one, that perhaps no point has given rise to more cases
or more nice discriminations and distinctions. All the cases of any
considerable weight have been very judiciously and accurately se-
lected by Mr. Cox in his note upon the case of *Evelyn v. Evelyn*.
The Bench, the Bar and the Public in general, are much obliged to
him for his very valuable edition of those very valuable reports. He
has there in as short a note as the subject would admit, put together
all the cases, and selected all the material points both of fact and
reason. Almost all the cases, that were quoted at the hearing, are
brought together in that note; and he has there stated the rules re-
specting this question so accurately and shortly, and so well extracted
the principles from all the cases, particularly *Tweddell v. Tweddell*,
which is a very governing case, that I would rather refer to his
words than use my own. I have taken the more time to consider
this case, because the inference, I draw from these transactions, is
different from that, Lord Thurlow drew from the transactions in
Tweddell v. Tweddell; for I am of opinion, that what has been done

(1) For the subsequent cases see the note, ante, vol. i. 187.

here is sufficient to make this the personal debt of the vendee; and I have taken great pains in order to show, that my determination does not in any degree contradict the principle there established.

I shall state the grounds upon which, I think, this case differs from that. It may be said, they are nice: but they are the only grounds, that can exist; unless you lay down at once, that the debt never can be made the personal debt of the vendee, unless by his expressly declaring, that it shall be his personal debt. It comes to this point only, whether by acts it may not be necessarily inferred, that he meant to make it a debt of his own. *Tweddell v. Tweddell* is very fully reported twice in 2 Bro. C. C. 101, 152; and has many expressions in it, which so fully govern my opinion, that I cannot wholly omit them. Lord Thurlow begins by stating, that in the first place it is absolutely necessary, the executor should be liable at law; for if not, it is impossible there can be any Equity in the heir to call upon him to pay out of the personal estate, when he would not be liable to pay at law. But though he may be liable at law, it does by no means follow, that he shall be equally liable in Equity, where both the personal and real estate descending upon the same person are liable to the debt. In the known case of an obligation

binding both the heir and executor, the heir has a right [* 131] * to call for exoneration out of the personal estate; which must be first applied. Where by the original contract the personal estate is the original debtor, and the real only a collateral security, it is much stronger in favor of the heir. Then this case has arisen. A man makes a contract pledging both his real and personal estate; the latter by a general obligation; part or the whole of his real estate as a specific pledge by way of mortgage. That estate descends upon his son as heir at law: the personal estate goes to the executor; and the question is, who pays the debt. It was a mixed debt of the father; but the son's only as owner of the collateral pledge; and he has a right to call upon the personal estate. Therefore if a person succeeding to an estate of that kind has done no act to adopt the debt and make it his personal debt, his personal estate is not liable: but if by his acts he has put himself so far in the place of his ancestor as to make the debt his own, that is understood to be the same as if he was the original mortgagor: but the Court has been extremely anxious not to make that inference, unless where it is perfectly clear and obvious; therefore though, the mortgagee pressing for his money, the heir is obliged to have a transfer of the mortgage, and, as every one knows, no assignee will take it without some personal covenant, upon that transaction he executes a bond to the new mortgagee, if he does it only for that purpose, not meaning to make himself more liable, it has been determined not to make it the personal debt of the party, whose original debt it was not. It has been attempted to prove, that what Richard Huntingford has done comes to that case, and that he joined only for that purpose. Most of the cases in Mr. Cox's note are of that

kind. *Tweddell v. Tweddell* is of a different nature. That was not the case of a mortgaged estate descending upon the heir; but it was a purchase of an estate subject to a mortgage. There was no communication with the mortgagee: but upon the sale there was a mere covenant of indemnity against the mortgage by the vendee. That is strongly relied on by Lord Thurlow. In commenting on *Tweddell v. Tweddell* he does not seem to disapprove the case of *Parsons v. Freeman*; but seems to agree with Lord Hardwicke's reasoning, and recognizes the principle, as far as it can be taken from the short note in Ambler. He intimates his doubt of *Lord Rockford v. Belvidere*; upon which therefore I shall not rely; as there are many difficulties occurring against that judgment, though by so high an authority. *Tweddell v. Tweddell* amounts only to this: * that [* 132] where a man buys subject to a mortgage, and has no connexion or contract or communication with the mortgagee, and does no other act to show an intention to transfer that debt from the estate to himself as between his heir and executor, but merely that, which he must do, if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally.

It remains to consider whether, in this determination, I do infringe upon that principle. I should be extremely sorry to do so; and have taken so much time in order to be sure, I do not. It is very unpleasant for a Judge, where an inference is to be drawn from equivocal acts; and the facts, upon which the decision turns, are distinguished by such nice lines. This is a sale of the estate by John Huntingford to Richard: who takes upon himself the payment of this money; to which before he was liable at law, and John both at law and in equity. The question is, Whether that transaction, and the subsequent loan of 40*l.* and a new mortgage by Richard acting as owner, did not make the debt his own? I cannot collect, that Lord Thurlow said, a man never could make a debt his own without an express declaration; and no case short of that can have that effect, if this is not sufficient. I am of opinion, that under all these circumstances Richard has clearly adopted the debt and made it his own, though primarily the debt of his son in equity and of himself and his son at law. The transaction in 1767, and the subsequent one with Wright, show he meant to put himself in his son's place; who has therefore a right to be exonerated out of the personal estate.

SEE, *ante*, note 3 to *Hamilton v. Worley*, 2 V. 62, and, to the authorities there cited, add *Butler v. Butler*, 5 Ves. 538; *Earl of Oxford v. Lady Rodney*, 14 Ves. 423.

WALKER v. WATTS.

[1796, MAY 30.]

TESTATOR directed, that his wife should have liberty to occupy his house for a year, provided she continues so long in L. Then by a distinct clause he directed his executors to pay her a guinea a week during her stay at L. Her residence there beyond the year does not entitle her to a continuation of the weekly payment.

GEORGE WALKER of Liverpool by his will gave to his wife a small estate in the island of Antigua, with the negroes upon it; also 100*l.* to be paid to her by his executors immediately after his decease: he also directed, that she should have liberty to occupy, hold and enjoy, the dwelling-house he then lived in, for one twelve-month, provided she continues so long in Liverpool: "Item, I order and direct my executors to pay and allow unto my wife one guinea weekly and every week during her stay in Liverpool for and towards household expenses."

The testator died in 1766, The wife received a guinea a week for a year after his death. She still continued to reside in Liverpool; and filed the bill upon the ground, that she would be entitled to a guinea a week as long as she should reside there.

LORD CHANCELLOR [LOUGHBOROUGH]. It would be giving a vast effect to the words to suppose he meant her to have a [* 133] guinea a week during her life. *He supposes her to live a year in Liverpool; and gives her a guinea a week towards the household expenses. Dismiss the bill.

THE purposes which a testator had in view, may properly afford some guidance to his meaning, and authorize a Court to qualify and restrain general words; and for the purpose of collecting the intention, the whole will must be taken into consideration, not giving to a particular sentence that unrestricted operation, which, if it stood alone, it might be entitled to have, but which would be inconsistent with the general tenor of the instrument; see, *ante*, note 4 to *Blake v. Bunbury*, 1 V. 194.

PARKER v. HUTCHINSON.

[ROLLS.—1796, MAY 14, 31.]

INTEREST allowed upon a written agreement to pay by instalments. (a)
Interest given at law upon a written undertaking to pay, or notes payable, on a day certain: not upon notes payable at a day uncertain, shop debts, &c. [p. 135.]

IN consequence of an advertisement publishing proposals by Joseph Butler, as agent for the sale of timber belonging to Sir Robert Butler, John Hutchinson agreed to purchase; and the following

(a) See *Newsam v. Douglas*, 7 Har. & J. 417; Chitty on Contracts, 642—648, Mr. Perkins's notes, and *ante*, note (a) to *Craven v. Tickell*, 1 V. 60, *post*, note (a) *Tait v. Northwick*, 4 V. 816. As to debts upon simple contract, and other debts which do not carry interest upon the face of them, Equity, in giving interest, follows the law. See 1 Barbour, Ch. Pr. 515.

agreement was signed by him and Joseph Butler at the foot of the said proposals.

"Agreeable to the above proposals Mr. John Hutchinson of Gainsborough in the county of Lincoln, timber merchant, doth agree to become the purchaser of the said timber (except as before excepted) at and for the price or sum of 4200*l.* and to pay the same to Sir Robert Butler or his agents by four payments, viz. 1100*l.* upon the 1st day of June 1778; 1100*l.* upon the 1st of June 1779; 1000*l.* upon 5th April 1780; and the remaining 1000*l.* upon the 29th day of September 1780. In consideration of which sum of 4200*l.* to be paid by the said John Hutchinson, his heirs, executors or administrators, in manner herein before mentioned, Joseph Butler of the city of York, agent to the said Sir Robert Butler, agrees to sell the said timber to the said John Hutchinson: as witness the hands of the parties this 10th day of May, 1777."

* After this agreement part of the timber to the value of [* 134] 200*l.* was sold to another person with the consent of Hutchinson; who by his will, dated the 16th of June, 1777, after directing, that all his just debts and funeral expenses should in the first place be fully paid and satisfied, devised part of his real estates to be sold; and directed, that the money arising from the sale should be paid and applied in discharge of his debts due and owing at the time of his decease; and after some specific dispositions he gave all the rest, residue and remainder, of his estate and effects as well real as personal, except household goods, plate, and certain other articles, upon trust to sell and pay his debts, and then upon other trusts.

The timber was felled and carried away: part in the life of the purchaser; the rest by his executor. The instalments were not paid according to the agreement: but several sums were paid on account. The bill was filed by Sir Robert Butler, and after his death revived by his executor, against the executors and devisees in trust of Hutchinson, for an account and payment of what should remain due on the timber account.

It appeared by the Master's report, that the only debt remaining due from the testator's estate was the balance due to the Plaintiff on account of the timber, amounting to 1301*l.* 3*s.* 11*d.* The Master refusing to calculate interest on that debt, the Plaintiff excepted.

The cases cited were, *Blaney v. Hendrick*, 3 Wils. 205. *Shepherd v. Charter*, 4 Term Rep. B. R. 275. *Rashleigh v. Salmon*, *Andrews v. Blake*, *Longman v. Fenn*, 1 H. Blackst. 252, 529, 541. *Creuze v. Hunter*, ante, Vol. II. 157.

May 31st. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I spoke to Lord Kenyon as to the practice at *Nisi Prius* upon promissory notes; and he says, the Judge does not leave it to mere damages; but directs the jury to give interest. I cannot conceive, that this Court has ever refused to calculate interest upon debts, that in their nature carry interest. I have looked into *Creuze v. Hunter*; and perfectly accede to it. The only point, I wished to know,

was as to the practice at Guildhall as to notes payable at a day certain or articles ; which is to give interest, not merely uncertain damages by a jury. That would be so vague and uncertain, that Courts of law have laid down the rule. They would not permit the jury to give interest by way of damages upon notes payable at a day uncertain or shop debts, &c. : but Lord Kenyon said, that upon notes payable at a day certain, or in such a case as this of a written undertaking, there would be no doubt in directing the jury to give interest. It would be very strange to do it upon a promissory note and not in this case. I am therefore of opinion to allow the exception. Refer it back to the Master to compute interest at 4 per cent. upon the debt due to the Plaintiff (1).

In *Rigby v. Maenamara*, 2 Cox, 420, Lord Rosslyn held it to be the settled practice of the Court of Chancery, not to allow interest on a promissory note, upon which it would be of course for a jury to give interest, by way of damages. This part at least, of that decision, is not followed, as an authority at the present day ; (*Bell v. Free*, 1 Swanst. 92) for it seems to be now clearly understood, that, wherever there is a written contract for money, payable upon demand, or upon a day certain, interest is payable from the time of the demand made, or from the fixed period of payment ; and there is no difference whether that contract is contained in a promissory note, or any other instrument. *Lowndes v. Collens*, 17 Ves. 28 ; *Upton v. Lord Ferrers*, 5 Ves. 803. Even in cases where the maker of a promissory note becomes bankrupt, interest may be proved in respect of such note, up to the date of the commission, although interest may not have been reserved on the face of the note ; see stat. 6 Geo. IV. cap. 16, sect. 57. But, on tradesmen's demands, interest is not allowed ; *Taitt v. Lord Northwick*, 4 Ves. 819 ; (see the note to that case, *post.*) unless there has been an unjust detention of the money, after demand made. See, *ante*, note 3 to *Craven v. Tickell*, 1 V. 60.

PEARCE v. LOMAN.
PEARCE v. TAYLOR.

[1796, MAY 31 ; JUNE 1.]

LEGACY, charged upon real estate, and payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment ; and the assets cannot be marshalled. (a)

JOSEPH PALMER devised his estate, called Axe, in the parish of Brodwinson in the county of Dorset, and all other his messuages,

(1) No interest upon a judgment on assets *quando acciderint* : *Deschamps v. Vanneck*, *ante*, vol. ii. 716. See the notes, vol. i. 63, 451 ; ii. 168.

(a) When legacies or portions are charged both upon the real and personal estates, if the legatees die before the time of payment, the legacies or portions will sink into the land, in all cases where they would be held to sink, if the fund consisted of real estate only ; and they will be considered vested, with regard to the personal estate, in all cases in which the same would be so adjudged, if the fund consisted of personal property only. And it is immaterial whether the provisions be made by deed or will. 1 Roper, Legacies, by White, 432, ch. 11, § 1. In such a case there could be no occasion to marshal the assets. As to the meaning and effect of the latter, see 1 Story, Eq. Jur. § 633.

lands and hereditaments, within the said parish, to Robert Pearce and Robert Taylor, upon trust to permit his mother to receive the rents and profits for life ; and after her death to apply the rents and profits for the maintenance and education of Thomas Pearce, son of Robert Pearce, until he should attain the age of twenty-one ; and when he should attain that age, in trust for him, his heirs and assigns, and in case of his death under that age, upon other trusts. He gave his mother all his stock upon the said estates and all his ready money. He also gave to Thomas Pearce and Robert, another son of the said Robert Pearce, the sum of 1000*l.*, to be paid to them respectively when they should attain their age of twenty-one years, with interest for the same at the rate of 3 per cent. from his death, until the said sum should be payable ; which interest he directed to be paid into the hands of the said trustees or the survivor yearly, to be applied for the support, education, and maintenance, of the said Thomas Pearce and Robert Pearce the younger respectively, or such part thereof, as his said trustees should think fit.

After several other legacies he gave all the rest and resi- [*136]
due of his messuages, lands, tenements and hereditaments,
and his manor, capital messuages, farms, lands, tenements, and hereditaments, situate at Clapton within the parish of Crewkerne in the county of Somerset, with their appurtenances, and all his goods, chattels, stock, and all other his personal estate and effects, whatsoever and wheresoever, not therein before disposed of, subject and chargeable with the payment of his debts, legacies, and funeral expenses, unto Robert Taylor and Robert Pearce the elder, their heirs, executors, administrators and assigns, in trust to see his debts, legacies, and funeral expenses, paid ; and after payment thereof then in trust for his cousin John Perkins, his heirs, executors, administrators, and assigns, to whom he gave the same upon this condition, that he should with all convenient speed after the testator's decease pay off and discharge all his debts, legacies and funeral expenses : but in case he should neglect or refuse so to do within a reasonable time after the testator's decease, then and in such case the testator gave his said trustees or the survivor, his heirs, executors or administrators, full power to sell and dispose of his said manor, capital messuage, farms, lands, tenements, and hereditaments, stock, goods, chattels, and effects, or any part thereof ; and out of the moneys thereby arising in the first place to pay all his debts and funeral expenses, and after payment thereof to discharge all the legacies therein before by him given to the several persons respectively or their trustees for their benefit ; and after the payment thereof and all costs, charges, and expenses, attending the same, he gave and bequeathed the overplus money and such of his said goods, chattels, lands, and tenements, as should remain unsold, unto his said trustees, in trust for the said Thomas Pearce and Robert Pearce the younger, to be divided between them share and share alike, when they should respectively attain their ages of twenty-one years ; and he declared that his will was, that the devise therein before in trust

for his cousin John Perkins should be void from the time of his refusal as aforesaid. The testator appointed Robert Taylor and Robert Pearce the elder, executors.

In 1776 a bill was filed on behalf of the infants Thomas and Robert Pearce to have the will established and the trusts carried [* 137] into execution; which was decreed upon the 22d of May, 1778; and the personal estate was directed to be distributed, and the legacies to the Plaintiffs were ordered to be paid into the Bank and to be laid out, with liberty to the legatees to apply when they should attain twenty-one; and in case the personal estate should not be sufficient for debts and legacies, it was ordered, that the heir at law and devisee John Perkins should out of the rents and profits of the estates charged with debts and legacies answer interest for the said two legacies of 1000*l.* each after the rate of 3 per cent. from the death of the testator to the time, at which the two Plaintiffs should attain twenty-one respectively, or to the death of them or either of them under that age; and in case of such deficiency that the Plaintiffs should be at liberty, when they should respectively attain twenty-one, to apply to have the principal raised out of the estates charged with the payment thereof, and paid to them. Upon the 12th of January, 1780, Robert Pearce the younger died, under the age of twenty-one, intestate, and unmarried. His father as administrator claimed the legacy as part of his personal estate. The cause came on upon the general report on the 11th of February, 1782; when it was ordered, that the Defendant Perkins should pay what appeared due for interest of the legacy of 1000*l.* given to Robert Pearce the younger to his administrator; and in default of such payment that he should be at liberty to apply to have the same raised out of the real estates charged; and as to the petition presented by Robert Pearce the elder relating to the principal of the said legacy of 1000*l.* given to Robert Pearce the younger, he not having attained twenty-one, it was ordered to be dismissed; but without prejudice to any future application relating to the said legacy.

Attorney General [Sir John Scott], Mr. Lloyd, and Mr. Ainge, for Robert Taylor the elder. This legacy being to be raised with all convenient speed, is vested, though the payment is postponed. It is different from the common case. But if not, and by the death of the legatee before the time of payment it fails as a charge upon the real estate, the assets shall be marshalled. *Reynish v. Martin*, 3 Atk. 330. 1 Wils. 130.

Solicitor General [Sir John Mitford] and Mr. Alexander, for the Defendants. The question in this cause has been already determined by the former proceedings. The cases are collected by Mr. Cox in a note to *The Duke of Chandos v. Talbot*, 2 P. Wms. 612.

The Court has constantly refused to marshal in these cases: [* 138] *Attorney General v. Tyndall, Foster v. Blagden, Hilliard v. Taylor*, Amb. 614, 704, 713. *Fild v. Mostyn*, before Lord Bathurst, 23d May, 1778. In none of the cases collected by Mr. Cox were the assets marshalled; and the expression in *The*

Duke of Chandos v. Talbot is, that the legacy must sink. *Lowe v. Moseley*, Ch. 6th May, 1752. *Reynish v. Martin* has not been attended to.

LORD CHANCELLOR [LOUGHBOROUGH]. I do not think the question at all shut out. The decree could not have pronounced upon this question. When the petition came before Sir Thomas Sewell after the event of the death of the legatee under twenty-one, he left the question open to some effect or other; and Lord Thurlow made no order upon the petition, that I can find upon the proceedings. I should not have felt much difficulty, if it had not been for *Reynish v. Martin*. There it was clearly out of the personal estate: the land was only an auxiliary fund. In this case the legacy is directly charged upon both the land and the personal estate. There is a clear intention here, I think, that it shall come out of the land. I will look at *Reynish v. Martin*.

June 1st. LORD CHANCELLOR. I have looked into *Reynish v. Martin* upon the only point, that struck me as having any degree of difficulty, as to marshalling the assets; for the point as to a charge upon land, payable at a future day, sinking by the death of the person entitled before the time of payment is settled so, that it could not be broken in upon without introducing great inconvenience into rules of property, that have been long settled. They are very correctly stated by Mr. Cox in the note, that has been referred to; where he has with his usual accuracy collected and arranged all the cases upon the subject. In *Reynish v. Martin* it is different from *The Duke of Chandos v. Talbot*; for in the former upon the event of a marriage with consent, and not otherwise, it was in the first conception of it given out of the personal estate; but there is a general charge at the end of the will upon the real estate. Atkyns gives a very long judgment by Lord Hardwicke. Upon looking into Lord Hardwicke's note I was at first inclined to doubt, whether Atkyns had not mistaken the case; because I found after a very long argument only this: "Adjourned" (to a particular day) "to look into the case of *Harvey v. Aston*;" and at the day, *to which it was adjourned, and all subsequent days, [*139] there is no notice in the Note Book at all upon it. I found in Mr. Forrester's notes the same case and the same sort of opinion, not so long, but much more correct; but to the same effect as that in Atkyns. Therefore I suppose, Lord Hardwicke did give that opinion. With regard to the case itself I have great doubt, whether the legacy ought to be paid, supposing there was personal estate to pay it; and I think, Lord Thurlow would not so determine. *Scott v. Tyler*, 2 Bro. C. C. 431, bears much against Lord Hardwicke's opinion. Following the idea, that appears very distinctly and well understood in that and other cases, I should doubt, whether so much respect ought to be paid to the rule of the Ecclesiastical Court, which is supposed to be derived from the civil law, and which I have recently (1) had occasion to say I wonder was

(1) *Ante*, 96, 98.

ever adopted in a Christian country. The proposition of the civil law is very plain ; but it turned upon local circumstances. All conditions upon marriage, without reasoning upon the effect or nature of them, were contrary to a positive law made in encouragement of marriage upon the peculiar circumstances of the Roman world at that time, antecedent to the two laws, *Lex Julia* and *Lex Papia Poppæa*.

With regard to marshalling the assets, in *Prowse v. Abingdon*, 1 Atk. 482, Lord Hardwicke had the point pressed upon him by Mr. Fazakerly ; and Lord Hardwicke declared it impossible to marshal in any case, except where in the first instance the person entitled to the legacy had an established claim distinctly and solely upon the personal estate ; and there could be no case for marshalling, where the legacy fails to affect the real estate in consequence of an event, that happened subsequent to the death of the testator ; as the death of the legatee before the time of payment. If marshalling could be carried to the extent of *Reynish v. Martin*, it might have been pursued in all the cases that have been decided. There is a singularity in the doctrine, as it now stands ; that as far as it affects one fund, it is good ; as far as it affects the other, bad : but it would be still more singular, if it shall sink in one case and not in the other, but the land making good the personal estate shall be charged. The point was of very little moment in *Reynish v. Martin* ; for in [* 140] Mr. Forrester's note the *gross amount of the personal estate is stated to be 100*l.* ; and Mr. Wilbraham, in Lord Hardwicke's note says, it is 100*l.* odd shillings and pence ; therefore he speaks accurately from an account of it. The legacy was 800*l.* Therefore I would not follow that case to introduce a new point with regard to marshalling assets against established rules. The assets cannot be marshalled. It would be directly against *Prowse v. Abingdon* : the contingency is the same ; and I cannot charge the real estate indirectly. I have found in Lord Hardwicke's Note Book the case mentioned by the *Solicitor General*. There is very little of it, but exactly what he states. The note is this : "*Lowe v. Mosely* upon the will of Mills. 300*l.* given to his daughter : 150*l.* at the age of twenty-four ; 150*l.* at twenty-six. He devises his real estate to his son James, he paying debts and legacies. Several questions upon acts the son had done. He had mortgaged ; question, whether the charge remained against the mortgagee. She died between twenty-four and twenty-six. I was of opinion, that 150*l.* was due, but that the other 150*l.* sunk in the real estate, she dying under twenty-six." Not a word said about marshalling. It was a mixed fund ; and a mortgage, I think, was one of the charges, that affected the personal estate.

SEE, *ante*, note 4, to *Stackpole v. Beaumont*, 3 V. 89, and to the authorities there cited, in support of the doctrine, that a portion charged upon land, payable at a future day, does not vest till the time of payment, see *Phipps v. Lord Mulgrave*, 3 Ves. 613.

BOULTON v. BULL.

[1796, JUNE 2.]

INJUNCTION; that the validity of a patent might be tried at law: verdict for the patentee, subject to the opinion of the Court upon the case: the Court equally divided: the patentee must bring another action: but the Court on the possession would not impose any terms upon him, nor dissolve the injunction in the mean time. (a)

BOULTON and Watts had obtained a patent for a fire-engine; under which they had been in possession twenty-seven years (1). The bill was filed for an injunction to restrain Defendants from infringing the patent; and an injunction was obtained, that the question as to the validity of the patent might be tried in an action. The Plaintiffs brought an action in the Court of Common Pleas; and obtained a verdict, subject to the opinion of the Court upon a case stated. Upon argument of that case the Court was equally divided (2).

Mr. *Graham* and Mr. *Alexander* moved to dissolve the injunction. *Attorney General* [Sir *John Scott*], for the Plaintiffs. It is the most ordinary jurisdiction of the Court to say, they will not alter the possession, *till the right is decided. In the [* 141] case of waste it is the specific right of the party to have the interference of the Court. In that case the Court would not permit the timber to be cut upon giving security for the value. So here there is a specific right, which the law will protect. I admit, we are bound to bring another action.

Lord CHANCELLOR [LOUGHBOROUGH]. I cannot put the patentees upon the acceptance of terms, that upon collateral reasons they think may be disadvantageous to the exercise of the right, of which they are in full possession: neither can I put them out of possession upon the difference of opinion of the Court. That is not the fault of the Plaintiffs. What has passed in the Court of Common Pleas does not shake their right; but strongly supports it. The verdict, though it has failed of effect, is not to be disregarded. The opinions of the Judges on both sides are deserving of great respect. If nothing can be done upon this, there must be another action. In

(a) The law has been settled in England, with regard to the granting of injunctions, that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed, until the opponent has fairly tried them at law and overthrown their pretension. The Federal Courts, under the patent laws of Congress, have equally protected the right by injunction. *Livingston v. Van Ingen*, 9 Johns. 585. See *Rogers v. Abbott*, 4 Wash. C. C. 514; *Ogle v. Ege*, Ib. 534. If a new trial is proposed to be moved for, this is a ground, on the part of the defendant, for opposing a motion by the plaintiff to make the injunction perpetual, and on the part of the plaintiff, for opposing a motion of the defendant to dissolve it. Godson, Patents; 631; *Gibbs v. Cole*, 3 P. W. 256. See Phillips, Patents, 451-469, ch. 24.

(1) The patent, which was originally granted in 1769 for 14 years, was by Stat. 15, Geo. III. renewed for 25 years.

(2) 2 H. Blackst. 453; *Hornblower v. Bolton*, 8 Term Rep. 95.

the mean time the injunction must be continued. I will not put them to compensation. I will not disturb the possession of their specific right. It is of notoriety, that this fire-engine has been erected in many parts of the country with great advantage.

For the Defendants. It was then desired, that the action might be brought in the Court of King's Bench: to which it was answered, that they might have a special verdict in the Common Pleas; upon which there might be a writ of error.

Lord CHANCELLOR. I will not lay them under any terms in bringing the action (1).

If any infringement of a patent be attempted, after there has been an undisputed enjoyment by the patentee under the grant, for a considerable time; Courts of Equity will deem it a less inconvenience to issue an injunction until the right can be determined at law, than to refuse such preventive interference, merely because it is possible the grant of the Crown may, upon investigation, prove to be invalid. Such a question is not to be considered as it affects the parties on the record alone; for, unless the injunction issues, any person might violate the patent, and the consequence would be, that the patentee must be ruined by litigation. *Harmer v. Plane*, 14 Ves. 132; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 707; *Williams v. Williams*, 3 Meriv. 160. But, if the patent be a very recent one, and its validity is disputed, an injunction will not be granted before the patentee has established his legal right. *Hill v. Thompson*, 3 Meriv. 624.

ATTORNEY GENERAL v. WHITCHURCH.

[ROLLS.—1796, JUNE 6.]

WHERE a charity cannot be executed as directed, but the general purpose appears distinct, and may be in substance attained by another mode, it shall be executed *cy pres*: but a personal bequest attached to a void charity, as an endowment, must fall with its principal. (a)

THOMAS COOKSEY devised four tenements in Jiggin Street, in the parish of St. Martin's, Sarum, to the churchwardens and vestry-men of the said parish "in trust for them to give to such poor men of this parish, as they think fit; if any of the descendants of John

Jenneway, formerly of this parish, apply, I desire, that [* 142] they may be preferred to have it; and as *I intend these

four house to be in the manner and custom of alms-houses for men and their wives, I give and bequeath to the churchwardens and vestry-men of this parish of St. Martins, Sarum, the sum of 2000*l.*, that is to say, in the 4*l.* per cent. Government securities, in special trust for them to dispose of the interest in the following manner: that is to say, my will is for them to give or allow to each of the four persons, that they allow or permit to inhabit the four

(1) *Harmer v. Plane*, *post*, vol. xiv. 130; *Hill v. Thompson*, 3 Mer. 622.

(a) As to the doctrine of *cy pres*, see, *post*, 633, note (a) to *Attorney General v. Andrew*.

houses in Jiggin Street, the sum of 13*l.* per annum, or 5*s.* a week, to be paid weekly, monthly, or at their discretion ; that is for a man and his wife : if one of them die, the single one to have 3*s.* 6*d.* a week ; and not permitted to bring in a second husband or wife."

The testator then gave the remainder of the said interest to other charitable purposes ; to which there was no objection. He appointed executors ; but made no disposition of the residue.

The testator afterwards having placed in the four tenements in Jiggin Street, four of his relations, namely, John Jenneway the elder, John Jenneway the younger, Mathew Jenneway and Samuel Smith, son of Elizabeth Smith, daughter of John Jenneway mentioned in the will, upon the 27th of December, 1792, by deed conveyed the said four tenements to trustees, to hold to them and their heirs to such charitable purposes as aforesaid ; particularly directing, that the said four tenements should at all times for ever after be held and used as almshouses, to be at all times hereafter occupied by four poor men and their wives, to be chosen and placed therein from time to time in manner therein mentioned : but he directed, that upon all occasions persons descended of John Jenneway, formerly of that parish, should be preferred thereto. This deed was duly enrolled in the Court of Chancery on the 10th of January, 1793. The testator died on the 29th of September, 1793. The information was filed at the relation of the churchwardens and vestry-men of the parish of St. Martin's, and a bill by John Jenneway the younger, and Smith, praying an account of the personal estate ; that the bequest of the 2000*l.* stock might be established, and the fund transferred to the relators to be appropriated according to the intention of the testator, or as nearly thereto, as the circumstances might admit ; or otherwise that it might be declared, to what extent the bequest was good. The * Plaintiffs [* 143] charged, that if so much of the bequest of 2000*l.* stock, as related to the persons to be inhabitants of the said four tenements, was void, yet the Plaintiffs were entitled to the benefit thereof for their lives as a personal bounty to them.

Mr. Lloyd and Mr. Hart, for the Plaintiffs. The bequest is good, unless it is so annexed to the houses as to bring it within *Wheatley's Case*, which went upon the locality ; the church being to be built in a particular place. *Attorney General v. Goulding*, 2 Bro. C. C. 428, has been since disapproved : *ante*, Vol. II. 388. The general charitable purpose shall be established, though the particular mode fails. Here the substantial purpose is to provide for four poor men and their wives. *Moggridge v. Thackwell*, 3 Bro. C. C. 517, *ante*, Vol. I. 464 (1). In *De Costa v. De Pas*, Amb. 228, a legacy to establish a Jewish synagogue was given to the Foundling Hospital.

Mr. Piggott and Mr. Romilly, for the widow : Mr. Graham and Mr. Daniel, for the next of kin. This is an endowment of these

(1) *Post*, vol. vii. 36. See the notes, *ante*, vol. i. 469, 554.

alms-houses, not a general charitable purpose. The distinction attempted would set aside the Statute of Mortmain: in the case of a school or an hospital it would be said, the purpose was education or the cure of sick. It was attempted in *Grieves v. Case*, 4 Bro. C. C. 68, *ante*, Vol. I. 548: but it did not prevail. There is no such specific object here as in *Blanford v. Thackerell*, 4 Bro. C. C. 394, *ante*, Vol. II. 238; where the primary object clearly was to educate the relations.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Upon this charitable disposition it was contended, that though it must be admitted, that the gift of the four tenements is void by the Statute of Mortmain, yet the other part, so far as it concerns the 2000*l.* stock appropriated for the maintenance of the poor men and women, may be supported as not being essentially connected with or belonging to it, but as denoting a general intention; which, though the rest fails, may remain and be fulfilled. With regard to the principles, upon which this Court has administered charities, where the same cannot be carried literally into effect, I refer and adhere to those principles, which I laid down as the rule, by which I conceive this

Court ought to govern itself, in *The Attorney General v. Boulbee*, * *ante*, Vol. II. 380, *post*, 220. A charitable bequest cannot be defeated by the negligence or default of the person to administer it, or by the impossibility to give effect to every circumstance. If the general intention appears consistent with the rules of law, and not against the Mortmain Act, it shall be carried into effect without regard to the secondary objects, which the testator might have intended.

The doctrine of *cy pres*, which has been so much discussed in this Court, and by which I understand the rule to execute the charitable intention as nearly as possible, however wildly and extravagantly it has been acted upon in former cases, is by late decisions, particularly since the Statute, administered in this way. The Court will not administer a charity in a different manner from that pointed out, unless they see, that though it cannot be literally executed, another mode may be adopted, by which it may be carried into effect in substance without infringing upon the rules of law. If the mode becomes impossible, the general object, if attainable, shall not be defeated. Therefore, though I agree with Lord Northington in *The Attorney General v. Tyndall*, Amb. 614, (1), that this Court is not to study to evade the Statute, with that restriction, I agree with Lord Hardwicke; in whose time the Statute passed, and to whose decisions upon this Statute and upon all other points I shall pay the greatest respect. At the same time I must admit, that the authority of *The Attorney General v. Bowles*, 2 Ves. 547; 3 Atk. 806, has been shaken by subsequent authorities; and it is not one of those decisions of his, that I can entirely concur in: I mean that part of it where admitting, that the object was to erect a building upon land

not then given, he throws out, that if land should be afterwards given, the Statute would not be evaded by applying the money to erect a building upon it. That is giving land in mortmain ; for it is another mode of purchase, and holding out a temptation to people to give land. Therefore the doctrine, that I consider established by Lord Hardwicke, and that has not been shaken, is this : that where the testator has pointed out two modes, the one consistent with the Statute, the other inconsistent with it, the Court will adopt that, which is legal, and will carry it into effect : but it is necessary in all these cases to see, whether the testator has given such an option, and there is an ultimate object consistent with the Statute, or not.

It remains to apply these principles to see, whether
* there is any intention to give this fund to the general [* 145]
purpose of providing for poor men and women, independent of the alms-houses, or whether an endowment only is proposed by the appropriation of part of the interest to that. In that view it must be admitted, that it must fail. *The Attorney General v. Goulding* is almost precisely in point. I believe, I may have intimated a doubt upon that case. I thought it a more rigid construction of the rules of the Court upon charitable bequests, than in prior cases had been adopted. Upon consideration of that case, I agree that it is right : but I do not agree with what Mr. Justice Bul-
ler is stated to have said, that the rule of the Court to execute the charitable purpose in another way had been varied. I perfectly agree with the rule laid down : but I deny, that it has been varied : nor was it necessary to support that decision, that it should be varied ; for the ground of it appearing in the report is, that applying the charity to any other object would be contrary to the intention. The decision of the case does not prove any variation of the rule laid down. It is extremely material, that the principles of the cases upon charities should be fixed and determined ; therefore I am very desirous, that the principles, upon which I decide this case, and con-
cur in *The Attorney General v. Goulding*, should be known. It is said, an intention to give this provision to any poor men and women may be collected. If I could collect that intention, I would execute it : but I cannot ; and so it is not enough to say, it is not inconsistent with that intention, or that if the testator could have foreseen the failure of his object, he would have given it to poor men and women without regard to the houses. Perhaps he would : but can I judicially pronounce, that he would ; or (for such is the office of a Judge) can I fairly infer, that he would, upon this will ? I cannot. An endowment with a restriction as to another wife or husband, an endowment, where the conduct of the parties is under the control of the trustees, is very different from a charity for poor men and women in general. I cannot create another charitable object for him, or apply this to any different object, so as to be warranted in saying, I fulfil the intention.

I think, the doctrine laid down in *The Attorney General v. Goulding* so explained is fortified by Lord Thurlow in some case

before him; and *Blandford v. Thackerell* is an authority for that decision, as well as for that, which I am about to make in this case. It might have been argued there, as it has been here, that if it could not take effect by a permanent establishment of a school, it might by paying a schoolmaster or mistress to teach poor children at large; therefore it might be established in that way, without regard to the particular direction: but the Lord Chancellor did not think himself warranted in collecting such an intention.

Therefore without shaking any rule laid down, except that part of *The Attorney General v. Bowles*, that I have mentioned, I am warranted in declaring, that under the true construction of this will the intention was to make an endowment of alms-houses; that there is no general intention beyond that; and therefore the bequest, so far as it concerns those alms-houses, must fail with the object, to which it was attached (1).

As to the application of the doctrine of *cy pres* to charitable bequests: see, *ante*, note 3, to *The Attorney General v. The Haberdashers' Company*, 1 V. 295, and notes 4, 5, and 6, to *Moggridge v. Thackwell*, 1 V. 464: see, also, the 7th note to the same case, that the construction of a will is not to be affected by any consideration of circumstances occurring after its execution, though if they had been contemplated by the testator, they would, probably, have influenced the disposition made by him. That an accessory bequest, attached to a void charity, must fail with its principal, see note 5, to the same last-cited case.

JENNINGS v. GALLIMORE.

[ROLLS.—1796, JUNE 7.]

MONEY settled in trust to be paid according to the appointment of A. and in default thereof to his legal representatives according to the course of administration; A. by will in pursuance of the power appoints to his legal representatives according to the course of administration; and makes a residuary legatee, whom he appoints one of his executors. Upon the will the next of kin are entitled. (a)

UPON the marriage of Thomas Turner and Dorothy Gallimore 1000*l.* was settled in trust, to invest it in Government or real securities, and pay the dividends or interest to Dorothy Gallimore, to her sole and separate use; and after her decease, in case there should be any issue of the marriage living, to divide the principal among the children share and share alike at twenty-one or marriage; but in case Thomas Turner should have no issue by Dorothy Gallimore, or they should all die in her life, then immediately after her death without issue of her body then living as aforesaid to pay the said 1000*l.* to Ambrose Gallimore, in case he should be then living;

(1) *Attorney General v. Hinzman*, 2 Jac. & Walk. 270.

(a) As to the meaning of "legal representatives," see 2 Williams, Exec. 820-832, and cases cited.

but if dead, then to such person or persons, and to and for such use and uses, intents and purposes, as he should by deed or will appoint; and for want of such appointment, then unto the legal representatives of him, the said Ambrose Gallimore, according to the course of administration.

Ambrose Gallimore, by his will reciting the settlement and his power of appointment proceeded thus: "Now I do hereby in pursuance of such power *direct and appoint the [* 147] said sum of 1000*l.* in case my said niece Dorothy Turner should happen to die without issue, to be paid by the said trustees or the survivor, his executors, administrators or assigns, unto my legal representatives according to the course of administration;" and he gave the rest, residue and remainder, of all his real and personal estate and effects whatsoever or wheresoever, to his nephew William Gallimore, son of his elder brother, and to his heirs and assigns for ever. He appointed his said nephew residuary legatee, and appointed his said nephew and John Home executors.

Dorothy Turner died without issue. The question as to the 1000*l.* was between the assignees of the testator's nephew William Gallimore, a bankrupt, and the other next of kin, a sister and nieces.

Mr. *Lloyd* for the next of kin, after citing *Bridge v. Abbot*, 3 Bro. C. C. 224 (1), was stopped by the Court.

Mr. *Graham* and Mr. *Pemberton*, for the Assignees. Upon the deed, the expression, which he follows exactly in the will, must mean the persons by law his legal representatives: viz. his executors. Why is the popular, loose, vulgar, sense to be adopted instead of the legal sense? The will must be construed as the deed creating the power; of which it is clearly intended to be an execution. Neither he nor the authors of the power meant all these persons.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. If it had rested upon the settlement itself, I should have had great doubt of being able to get over the words "legal representatives;" and if he had died intestate without executing the power, I should have paused long, before I could have given any other interpretation than that contended for by the assignees: but I cannot read this will without implying an intention to consider it otherwise. He would never have made such a will, if he had thought, all the words he had used came to nothing more than executing the power by giving the fund to William Gallimore; which power he anxiously takes the trouble to execute, and expressly recites, that it enables him to give it to any person, he thinks fit. If he meant to give it to him, *to whom he has given all the rest, why did he not say [* 148] so? I am now told, this recital and anxious execution of the power and distinction of this fund from the rest, means only to give to him, to whom he might, if he thought fit, have given it expressly. I cannot think, he so intended it. As a lawyer I must have understood the words, as the assignees do. If it was upon the deed alone;

(1) See *Evans v. Charles*, 1 Anstr. 128.

and he had died intestate, I must have considered, that it was a deed ; and though I could not know, what the party meant, I must have given the words their legal sense : but it is almost impossible to suppose, any man using these words could have meant the construction contended for by the assignees ; and which perhaps might without the will have been the true construction : but I desire not to be understood to decide that. But upon the will I am of opinion, first, that he did not intend William Gallimore to have this fund ; and then the only persons, who can take it, must be those entitled to his personal estate. Therefore declare, that it belongs to the next of kin. I desire, it may be understood, if this case is quoted, that I am not by this putting any construction upon the deed itself : it is entirely upon the will and the execution of the power thereby.

A REQUEST to the testator's "legal representatives," may have reference either to the artificial representation granted by the Ecclesiastical Court ; or it may be intended to point out those who would take under the Statute of Distributions. Taking the words by themselves, the first would be the proper construction ; but the context may show that the testator meant his next of kin within the statute ; and the Court, if satisfied that such was the intent, will carry it into execution. *Long v. Blackall*, 3 Ves. 490 ; *Bridge v. Abbott*, 3 Brown, 226 ; *Evans v. Charles*, 1 Anstr. 132 ; *Horseman v. Abbey*, 1 Jac. & Walk. 387 ; *Holloway v. Holloway*, 5 Ves. 402. So, if a testator direct, that the whole of his property shall pass "according to law," save and except certain specified legacies ; and afterwards, by an unconnected clause, he appoints an executor ; although neither construction is free from difficulties, it has been held, that it is more natural to infer an intention in favor of the next of kin, than in favor of the executor. *Lord Cranley v. Hale*, 14 Ves. 310. Under a grant from the Crown to the representatives of a person deceased, his executors will take, but subject to the same trusts, as they take his general estate : *Stevens v. Bagwell*, 15 Ves. 153.

ABBOT v. MASSIE.

[1796, JUNE 8.]

LEGACY to Mrs. G. Evidence admitted. (a) Executor refusing to act, cannot take a legacy to him as executor, (b) [p. 147.]

TESTATOR bequeathed "to Mr. James Massie of St. Martin's Lane and W. G. 50*l.* as executors: pint silver mug and all my china to Mrs. G. and 10*l.* for mourning."

Mr. and Mrs. Gregg claimed under the description of W. G. and Mrs. G.; but the former refused to act as executor. The Master refusing evidence, that they were the persons intended, they excepted to the report.

Mr. *Mansfield* and Mr. *Hart*, for the exception, cited *Masters v. Masters*, 1 P. Wms. 421, and *Baylis v. The Attorney General*, 2 Atk. 239; where Lord Hardwicke mentions instances, in which evidence has been admitted.

* The *Attorney General* [Sir John Scott], for the report, [* 149] cited *Hunt v. Hort*, 3 Bro. C. C. 811.

LORD CHANCELLOR [LOUGHBOROUGH]. The Master should receive evidence, but legal evidence, to prove, who Mrs. G. was: but as to the 50*l.*, it is impossible that can be allowed; because it is given to him as executor; and he did not prove the will (1). I must overrule the exception with regard to that. I do not mean to tell the Master, what evidence he is to receive.

(a) Where a complete blank is left for the devisee's name in a will, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. 2 Williams, Exec. 836; *Miller v. Travers*, 8 Bing. 244. See also *Bradshaw v. Bradshaw*, 2 Y. & C. 72. But where a blank was left for the Christian name only, parol evidence was admitted to prove the individual intended. *Ibid.* *Price v. Page*, 4 V. 680. Where the description in the will, of the person or thing intended, is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove, which of such subjects was intended by the testator. But if the description of the person or thing be wholly inapplicable to the subject intended, or said to be intended by it, evidence is inadmissible to prove whom or what the testator really intended to describe. Greenleaf, Evid. § 290; *Doe d'Gord v. Needs*, 2 M. & W. 129; *Brown v. Saltonstall*, 3 Metc. 423. This rule has been recognized by a distinguished writer, when he confines the introduction of parol testimony to cases "where the object of a testator's bounty, or the subject of disposition, (that is, the person or thing intended,) is described in terms, which are applicable indifferently to more than one person or thing." Wigram on Wills, 101, Proposition VII; also pl. 80. See *ante* note (b) to *Baugh v. Read*, 1 V. 257.

(b) Where legacies are given to persons, in the character of executors, and not as marks of personal regard only, such bequests are considered to be given upon an implied condition; viz., that the parties clothe themselves with the character in respect of which the benefits were intended for them. 2 Williams, Exec. 919; *Freeman v. Fairlie*, 3 Meriv. 31. See *post*, note (a) to *Harrison v. Rowley*, 4 V. 212.

(1) *Read v. Devaynes*, 3 Bro. C. C. 95; *Post*, *Harrison v. Rowley*, vol. iv. 212, ix. 534; *Stackpoole v. Howell*, xiii. 417; *Dix v. Reed*, 1 Sim. & Stu. 237.

Upon this it was agreed, that Mrs. Gregg should take the silver mug, the china, and 10*l*. (1). —

1. SEE, *ante*, note 3, to *Parsons v. Parsons*, 1 V. 266, as to the admission of evidence in order to ascertain who was the legatee meant by a testator.

2. Legacies given to executors, expressly in consideration of the care and trouble which may be required in the execution of the testator's will, of course cannot be claimed, when the duties, with which they were connected, have been renounced. *Freeman v. Fairlie*, 2 Meriv. 31; *Humberston v. Humberston*, 1 P. Wms. 133. And, if a legacy be given to a man as executor, whether it is expressed to be for care and pains, or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor. *Roach v. Haynes*, 8 Ves. 593; *Harrison v. Rowley*, 4 Ves. 216; *Read v. Devaynes*, 3 Brown, 95. The burthen of proof, that a legacy was intended for an executor in a distinct character, rests with him; the *prima facie* presumption is, that it is given to him as executor. *Stackpoole v. Howell*, 13 Ves. 421. But, where a legacy is given, not merely in contemplation of future services, but also in token of regard, and no actual *laches*, by refusing or neglecting to accept the trusts of the testator's will, is made out; the legacy cannot be withheld, upon an apprehension of a subsequent breach of duty. *Brydges v. Wotton*, 1 Ves. & Bea. 134. And a legacy, given in such terms as those last stated, cannot possibly be forfeited by the death of the executor before he has acted, to any but a very trifling extent, in the execution of the will; or it is presumable, even although he has not acted at all, if he had no fair opportunity of doing so, and had not manifested any intention to renounce the trust. *Harrison v. Rowley*, 4 Ves. 215; *Parsons v. Saffery*, 9 Price, 563. See 1 Hovenden on Frauds, 462, 463, whence this note is extracted.

DOMMETT v. BEDFORD.

[ROLLS.—1796, JUNE 9.]

ANNUITY by will charged upon real estate for A. for life, payable to him only, upon his own receipt, and no other, and to cease immediately on alienation, ceases by the bankruptcy and bargain and sale of the estate of A.

THOMAS BEDFORD by his will duly executed gave, devised, and bequeathed, to his niece Anne Ireland one annuity of 30*l*. to be paid her by two equal half-yearly payments during her natural life; the first payment thereof to be made in six months after his decease; under this strict direction, that this annuity should not be subject to the debts or control of her present or any future husband; and that the same should from time to time be paid to herself only; and that a receipt under her hand and no other should be a sufficient discharge for the payment thereof: his intent being, that the said annuity or any part thereof should not be alienated for the whole term of her life or for any part of the said term; and if same should be so alienated, said annuity should immediately thereupon cease and determine; and he also gave and bequeathed unto his nephew Richard Tubb one annuity of 30*l*. during his natural life, payable in like

(1) *Parsons v. Parsons*, *ante*, vol. i. 266, and the note, 267; but this seems a case of patent ambiguity.

manner as the former annuity, and with the same direction of being paid to himself only and upon his own receipt, and under the same restriction against alienating the same or any part thereof; and he also gave and bequeathed to his nephew Bedford Woodham one annuity of 30*l.* during his life, payable in like manner as the above annuities, and with the same direction of being paid into his own hands only, and upon his own receipt, and under the same restriction against alienating the same or any part thereof; and he charged the above three annuities upon his real and freehold estates; and devised to *his nephew John Bedford his free- [*150] hold estates; subject to the said annuities.

The testator died in 1789. Upon the 16th of November, 1790, a joint commission of bankruptcy issued against Bedford Woodham and his partner Alexander Davidson; and an assignment of their personal property and a bargain and sale of their real estate were duly executed. The bill was filed by the assignees against John Bedford and the bankrupt, praying, that the Plaintiffs might be declared entitled to the annuity, the arrears since the bankruptcy, and the future payments during the life of Bedford Woodham. The bankrupt by his answer submitted, that he was entitled, as he had not voluntarily alienated. An issue was directed to the Court of King's Bench (1). The certificate was, that by the bankruptcy of Bedford Woodham, and the indenture of bargain and sale of the 30th of June, 1791, the annuity of 30*l.* given to the bankrupt Bedford Woodham by the will of Thomas Bedford ceased and determined. Upon the equity reserved the bill was dismissed; and without costs; the MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] saying, it was a very doubtful point, and the Defendant had a great advantage by the failure of the bankrupt: but that he would consider of the costs at law.

1. THE trial of the legal question arising in this suit, as to which a case was directed, is reported in 6 T. R. 684.

2. There is no doubt that property may be given to a man until he shall become bankrupt, and no longer. It is equally clear, as a general proposition, that when property is given to a man for his life, the donor cannot take away the incidents of a life estate; and, therefore, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a provision that he shall not sell or alien; still, that condition may be so expressed as to amount to a limitation, reducing the interest given to something short of a life estate; and if that be the case, neither the donee nor his assignees can have it beyond the period limited. *Brandon v. Robinson*, 18 Ves. 433.

3. In *Wilkinson v. Wilkinson*, Coop. 261, when the suit was first brought on before Sir William Grant, M. R. that distinguished judge observed, that Courts of Law have held an assignment by operation of law (which bankruptcy is) not to be within the meaning of an ordinarily worded clause, in a will, against alienation. And when the same cause was again heard, before Sir Thomas Plumer,

(1) 6 Term Rep. 684; *Post*, *Shee v. Hale*, vol. xiii. 404; *Holyland v. De Mendez*, 3 Mer. 184: but a provision against bankruptcy will not protect property of the bankrupt's against his creditors: *post*, *Ex parte Cooke*, vol. viii. 353, and the note p. 356; *Higginbotham v. Holme*, xix. 88.; *Ex parte Taaffe*, 1 Glyn & Jam. 110.

M. R. on exceptions to the Master's report, it was considered matter of surprise that the subject of bankruptcy should have been alluded to in the argument as affording any ground for contending that the life estate of the bankrupt had ceased by the assignment under his commission; though by *other acts* charging his life interest, and intercepting his personal enjoyment thereof, the life estate of the bankrupt was held to have ceased, under the special proviso of the will by which it was limited to him. *S. C.* 3 Swanst. 522, and 2 Wils. Ch. Ca. 63. But though, in the case just cited, the assignment consequent on bankruptcy was not deemed to be such an alienation as was there contemplated by the testator, yet, in *Cooper v. Wyatt*, 5 Mad. 490, where the words of the proviso were, that a trust annuity for life should cease, "if, by any ways or means whatsoever, the annuitant should sell, dispose of, or encumber, the right, benefit, or advantage he might have for life, or any part thereof," Sir John Leach, V. C. held, that it was no strain to consider the annuitant's bankruptcy as a way or mean by which his interest in that property was disposed of; and, at all events, that construing the proviso with reference to the previous direction of payment into the annuitant's "own proper hands, for his own sole use and benefit," the interest must cease whenever it could no longer be the subject of the donee's own personal enjoyment, and that it could not vest in the assignees under his bankruptcy. It seems, however, that if an annuity be bequeathed "as an inalienable provision for the annuitant's personal support," with a proviso that "if he shall do or execute any act, deed, matter, or thing to charge, alienate, or affect the same, it should thereupon be suspended," the annuity will not be divested by the outlawry of the annuitant. The ground of the decision to this effect was, that the proviso only contemplated positive acts on the immediate part of the donee, not a compulsory process on the part of the Crown. *The King v. Robinson*, Wightw. 392.

4. Courts of Law look narrowly into conditions for defeating leases. The lessor may, no doubt, provide against any change of occupancy, as well as against an assignment; but, to effect this, he must take care not to use words which are capable of any other meaning. A covenant that the lessee will not assign "or otherwise do or put away" the lease or premises demised, does not extend to an under-lease for part of the term, nor can the lessor, under a proviso for re-entering on breach of any of the covenants of the lease, recover possession; for, in a certain sense, devising a term is a doing or putting it away: so, if the lessee die intestate, or become a bankrupt, or confess a judgment, under which the term is taken in execution, in all these cases the term may be said to be done or put away; but none of them amount to a breach of such a covenant as that above stated. *Crusoe v. Bugby*, 2 W. Bl. 766; *S. C.* 3 Wils. 237. See the notes to *Williams v. Cheney*, 3 V. 59. A distinction has been made between acts which are done voluntarily by the party, and those which pass *in invitum*: *Doe v. Carter*, 8 T. R. 61: but although judgments, in the *prima facie* contemplation of law, always pass *in invitum*, still, if it can be shown that a tenant has consented to have judgment entered up against him in an action, the real object of which was to effectuate a transfer of a lease, in evasion of a covenant against alienation, this contrivance will not avail. *S. C.* Ibid. 301. And the continuance of a term may be so limited, either by will, as in *Doe v. Hawke*, 2 East, 486, or by the terms of demise *inter vivos*, as in *Doe v. Clarke*, 8 East, 186, that the term shall depend upon the personal occupation of the lessee; if this be the case, should the lessee not choose to reside upon and occupy the premises, or should the term be taken in execution, or under a commission of bankrupt against the lessee, the lessor may maintain ejectment without a previous re-entry; the continuance of the term itself having been made dependant on such a conditional limitation. Such a case is plainly distinguishable from *Doe v. Bevan*, 3 Mau. & Sel. 358, which decision went upon the effect of the ordinary clause of a lease restraining the tenant, his executors, administrators, or assigns, from assigning, without license. The tenant became bankrupt, and it was held, that the assignees under his commission might assign the lease without the consent of the vendor, for that the assigns contemplated by the proviso were voluntary assigns, or such as should come in by act of the party, not assigns by operation of law. The same doctrine was recognized in *Corrie v. Onslow*, 2 Mad. 341.

MALIM v. BARKER.

[ROLLS.—1796, JUNE 13, 14.]

BEQUEST to A. for life, with power on her marriage to appoint the interest to her husband for life, and a recommendation to dispose of the principal after her own death and the determination of the preceding trusts among the children of B. the recommendation being held an absolute trust, (a) it is a vested interest in all the children, subject to be divested by appointment; and there being no appointment, children born after the death of the testator, and those who died in the life of A., are entitled with the rest.

THIS cause, (reported *ante*, Vol. II. 333, 529) came on for farther directions. The Defendant Barker was executor of Samuel Scholey, who was executor of the testator Thomas Lowe. The bill, as against Thomas Keighley, husband and administrator of Sarah Keighley, had been dismissed with costs.

It appeared by the Master's report that Thomas Lowe, the testator, died in 1761, and Sarah Keighley, his daughter, died in 1793. The children of John and Anne Malim living at the death of Sarah Keighley were Lucy Anne Harris, Mary Anne Phillips, William Henry Owen Malim, and Caroline Matilda Morris. The children of John Lowe living at the death of Sarah Keighley were John Lowe the younger, Sarah Marshall, and Charlotte * Atkinson. William Henry Owen Malim and Caroline [* 151] Matilda Morris were born after the death of the testator. Emelia, the natural daughter of John Lowe, died in the life of Sarah Keighley intestate and without issue.

The question upon the report was, whether such of the children who survived Sarah Keighley, as were born after the death of the testator, were entitled equally with the rest: there had been other children, who died in the life of Sarah Keighley: but that did not appear upon the report.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN.] The first point in this cause was, whether there was an absolute trust for these children upon this will; and it was determined, that it did raise such trust; that Sarah Keighley had only the use of the fund for life, with a recommendation operating as a trust to dispose of it among them. The question now is, to whom the money is to be distributed. There is no doubt that children living at the death of Sarah Keighley, though born after the death of the testator, are entitled. The next question is as to those, who died in her life; whether it is not a trust for all the persons described: who are all the children (1). How are you to exclude those who died in the life of the tenant for life? It is said, that being a power of appointment, it must mean, that it should be appointed in favor of such of the children, as should be living at the death of this daughter: but that is not the construction for two reasons: first, because there is a

(a) See *ante* note (a) to S. C. 2 V. 333.

(1) See the note, *ante*, vol. i. 408.

case, in which he gave these sisters in the event of their husbands surviving them a power of disposing to their husbands for their lives; secondly, which makes it impossible to confine it to those living at the death of Sarah Keighley, it was not necessarily to be done by will: but she might at any time during her life have appointed by deed in favor of any of the children, though they might not survive her. Therefore, upon the true construction of these words, I am clearly of opinion, that if she had appointed, it was to be in favor of all such children born after the death of the testator, whether they survived Sarah Keighley or not. Every child that came *in esse*, acquired a vested interest, liable to be divested by the exercise of the power of appointment (1); and there being no appointment, I must construe it, as if there was no power; and it has been determined over and over, that in such a case all children coming *in esse* shall take. Therefore it must be referred to the

[* 152] * Master to inquire, whether any and which of the children of Anne Malim and of John Lowe died in the life of Sarah Keighley, and who are their personal representatives; and reserve farther directions and costs.

The share of Emilia belongs to the Crown: but there must be an administration.

SEE, *ante*, the notes to S. C. 2 V. 333.

BARROW v. GREENOUGH.

[ROLLS.—1796, JUNE 18.]

PROVISION by will increased upon evidence of the testator's request to the executor and residuary legatee and his promise; upon which the testator refused to make a new will; and said, he would leave it to the generosity of the executor. (a)

JOHN BARROW by his will directed, that his wife Ellen should have during her natural life fifty-two guineas a-year; and that she should have the interest of the remainder of what he should die possessed

(1) See the note, *ante*, vol. i. 309.

(a) Equity has jurisdiction, where there has been a fraudulent prevention of acts intended to be done for the benefit of third persons. It will take from third persons, and *a fortiori*, from the party himself, the benefit, which he may have derived from his own fraud, imposition, or undue influence, in procuring the suppression of such acts. 1 Story, Eq. Jur. § 256, and English cases cited. And Equity will exert its powers in such cases, notwithstanding the Statute of Frauds, by decreeing the specific performance of the contemplated act or trust; for though the basis of the proceedings is a parol declaration, creating a trust, contrary to the statute of Frauds, yet the jurisdiction of the Court will be maintained, in order to prevent fraud. 2 Ib. § 781. But in the present case, the admission of the defendant seems to have established the trust. See *ante* note (a) to *Hare v. Shearwood*, 1 V. 241.

of: but if his sister Mary Barrow should over-live Ellen Barrow, she was to have the interest of all, that remained, during her life. After some legacies he appointed John Greenough and his son John Park Greenough executors. He then gave some legacies; and gave all his household furniture to his wife; and declared, that although he had directed, that Mary Barrow should have the remainder of the interest, his meaning was, that she should have 25*l.* a-year; and that John Park Greenough after the death of Mary Barrow should have interest of what remained after paying Ellen Barrow her interest; and after the death of his wife and his sister Mary Barrow he gave to John Park Greenough all the residue of his estate and effects after payment of his debts and charges, as therein mentioned.

John Greenough died in the testator's life. The bill was filed against the surviving executor by Ellen and Mary Barrow; and the question arose upon the circumstances of a transaction, which appeared by evidence thus: Turner, examined for the Plaintiffs, deposed that the following paper was given to him by the Plaintiff Ellen Barrow:

"John Barrow of Brazen-nose Street, Manchester, said unto me, John Greenough, a few days before his death, that he had left his wife Ellen Barrow fifty-two guineas a year; and he said, it was his wish and desire, that she should have sixty guineas a year during her life, and his sister Mary Barrow 25*l.* a year during her life; and that they should have what was necessary * in [* 153] case of sickness out of the stock; and if his wife Ellen should outlive his sister Mary Barrow, she should have her sister Mary Barrow's income of 25*l.* a year added to her yearly income."

The witness farther deposed, that upon his desire to see Ellen Barrow and the defendant together, they met at the office of the deponent; who producing this paper, the Defendant acknowledged it to be his own hand-writing; and then promised, that he would fulfil and perform the same according to the testator's request.

Lord, examined for the Defendant, deposed, that he was in company with the testator and the Defendant a few days before the death of the testator: who acquainted the Defendant with his will, and said, he had left the Plaintiff Ellen an annuity of fifty guineas; but that it was his wish and desire, that she should receive an annuity of 60*l.* for her life: and that he had left his sister Mary Barrow 20*l.* a year; and if they should be in want in case of sickness, they should have what was necessary out of his stock; and the testator then requested the Defendant to see, that such annuity of 60*l.* was paid to the Plaintiff; which he promised the testator should be done in the same manner as if it had been expressed in his will; and he and the Defendant desired the testator to send for some person to draw a new will; but which the testator refused to do: saying, he would leave the same to the Defendant's generosity; and that the testator informed the Defendant, he would derive a benefit under his will to the extent of 1000*l.* or nearly so.

The answer stated the transaction in the same manner as the de-

ponent Lord, except by representing, that the annuity, which the testator said he had by his will given to his wife, was fifty-two guineas, and that the Defendant could not recollect, whether the annuity, the testator wished her to receive, was sixty pounds or sixty guineas.

Mr. *Graham* and Mr. *Allcock*, for the Defendant, resisted the claim of the Plaintiffs as contrary to the Statute of Frauds: and insisted, that if this conversation could be established, the testator intended, that the Defendant should have a discretion. They also stated, that the Defendant, if he was to answer this demand, could not be benefited to the extent of 1000*l.*, as intended by the testator.

[* 154] *Mr. *Lloyd* and Mr. *Pemberton*, for the Plaintiffs, contended that it was a case of fraud excepted out of the statute; and they cited some of the cases upon that subject collected, *ante*, 38, 39, (note).

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I have no doubt about this case. It has been very well argued for the Defendant. It turned entirely upon the word "generosity;" whether the testator meant by that word, that he did not mean this to be his will. I will not criticise upon words; nor do I think, the word "generosity" can be construed to take away the effect of a solemn desire of the testator coupled with the promise of the Defendant. The Defendant had no intention of fraud at that time: for he desired the testator to make a new will. Leaving it to his generosity! It is leaving it to his honor and conscience. *Vir generosus* is a man of noble feelings. There is no doubt of what he meant by it. I am very happy, that I have under the Defendant's hand-writing the particulars of the conversation; so that there can be no doubt about it; for this evidence shows, how dangerous it is to determine upon parol evidence only. If it rested on that only, the testator's intention could not have been effected; for Lord's evidence is certainly different. The fact turns out to be, that there was a conversation; it stands in his own hand-writing; and there is no evidence of duress. He puts it down as evidence of what he did say. To corroborate this, his own admission of the conversation, there is the witness Lord. He does not speak as to the sister's annuity so fully as the paper: but he swears, that whatever the testator desired, which I take from the Defendant himself, the Defendant promised, he would do. The question is, whether by reposing that trust in the Defendant the testator was not prevented from making a new will. The Defendant ought to have told him, that if he did not put it in his will, he would not do it: instead of that he promised to do it; upon which the testator refuses to make a new will; and says, he leaves it to his generosity: that is, he leaves it to his conscience. I am quite relieved from any difficulty as to the statute. The question is, whether the confidence, that the Defendant would perform the trust he undertook, did not prevent the testator from making a new will. I shall make him perform it, and order him to

pay the increased sum out of the assets with costs; and if the assets are not sufficient for the costs, he shall pay them personally. The course of all the cases is, that it shall come out of the assets; for *the executor undertakes it as part of the will; not [* 155] personally. If it had not been for this written paper, I should have hesitated very much about admitting evidence against a written will. Let the Master take an account of the personal estate, debts, &c. and apportion a sufficient part to answer the annuities of 52 guineas and 25*l.* to the wife and sister of the testator. Declare, that out of the residue of the personal estate so much is to be set apart as will be sufficient to make up the annuity to the wife 60 guineas during her life: at the death of either or both, any of the parties to be at liberty to apply; and let the Defendant pay the costs (1).

SHOULD an heir, or personal representative, whose interests would be affected by the regular insertion of a bequest in a will, induce the testator to omit making a formal provision for an intended object of his bounty, by assurances that the testator's wishes shall be as fully executed as if the bequest were formally made, this promise and undertaking will raise a trust, which, though not available at law, will be enforced in Equity, on the ground of fraud. *Chamberlain v. Agar*, 2 Ves. & Bea. 262; *Mestaer v. Gillespie*, 11 Ves. 638; *Stickland v. Aldridge*, 9 Ves. 519; *Chamberlaine v. Chamberlaine*, 2 Freem. 34; *Oldham v. Litchford*, 2 Freem. 235. And such an engagement may be entered into, not only by words, but by silent assent to such a proposed undertaking, which will equally raise a trust. *Bryn v. Godfrey*, 4 Ves. 10; *Paine v. Hall*, 18 Ves. 475. Of course, the case would be still stronger if the due insertion of the bequest in the will had been prevented by any violent interference. *Dixon v. Olmuis*, 1 Cox, 414.

COXE v. BASSET.

[ROLLS.—1796, JUNE 20, 22.]

A GENERAL charge of debts and legacies upon all the real estates of the testator not annulled by a subsequent power to sell a particular estate only, and apply the produce to the same purpose: but that estate was first applied. Construction of a will, and several very inaccurate codicils upon a disposition of the personal estate, as to the interest, whether absolute or for life; as to the extent, whether general, or specific, and exempt from debts. (a)

Though the testator has charged his real estate with debts in aid of the personal, the personal may be given exempt from the debts by an unattested codicil, (b) [p. 155.]

The Court will not execute a power given by the testator to trustees to continue his charities, or to give any others they should think fit, [p. 155.]

HENRY HIPPLESLEY COXE devised to Sir Francis Basset, John Hippleasley and Richard Paget, his mansion-house at Ston Easton,

(1) *Post*, vol. ix. 519, xi. 638; *Devenish v. Baines*, Pre. Ch. 3; *Reech v. Kenne-gal*, 1 Ves. 123; *Amb. 67*; 2 Ves. & Bea. 262. See the note, *ante*, p. 38.

(a) See *post*, p. 160, note (a).

(b) In illustration of this, see *ante*, note (b) to *Buckeridge v. Ingram*, 2 V. 652.

and all his manors, by name, with the several messuages, farms, lands, tenements and hereditaments, rights, members and appurtenances therein comprised, and all other his messuages, farms, lands, tenements and hereditaments, whatsoever and wheresoever, in the county of Somerset, and also his mansion-house called Peamore House with the appurtenances, and the manor of Brenton, and all his farms, lands, tenements and hereditaments, in several parishes named and elsewhere in the county of Devon, upon trust in the first place to pay and apply the rents, issues and profits, of the said premises for the payment of the interest of all money due upon securities from him upon his own account or as representative of his late brothers Richard and John, except such debts, as were not contracted for their own use, or for which they or either joined in security with any other person; and in the next place to pay to his sister Mary Buller an annuity of 100*l.* and to his sister Ann James an annuity of 200*l.* for life respectively. He then gave, devised and bequeathed his said mansion-houses and all and singular his said manors, lands, hereditaments and premises, subject and liable to the payment of his debts and legacies and to the said annuities, to trustees for 500 years, to raise portions for younger children, and [*156] after the expiration of that term, to his *wife Elizabeth Ann for life; and after the expiration of that term, and that life estate and subject thereto he devised all the said estates to the use of his first and other sons in tail; and for default of such issue, as to the Somerset estates to the use of his daughters in tail; and in default of issue male as to the Devon estates, and of all issue male and female as to the Somerset estates, to the use of his nephew John Francis Buller and his issue male in strict settlement with several remainders over, with powers of jointuring and leasing; "provided always, and my mind and will farther is, that it shall and may be lawful for the said Sir Francis Basset, John Hippeley and Richard Paget, or the survivor of them, or the heirs of such survivor, to sell and dispose of in fee simple my messuages, lands, tenements and hereditaments, situate in the parish of Midsomer Norton only, which devolved to me under the settlement thereof by Mrs. Mary Hooper deceased, and the whole estate and interest therein, as well in possession as reversion (except all coal under such last mentioned lands, tenements and hereditaments, in the said county of Somerset); and by and from the money therefrom arising to pay off and satisfy and discharge the above mentioned debts and legacies in such order and manner, and with such preference and priority, as the person or persons so selling shall think meet and expedient, and to invest the surplus, if any, in the purchase of other lands, tenements or hereditaments; which may be by him or them considered to be advantageous to my other estates;" which he directed to be subject to the same uses, trusts and purposes, as therein mentioned and expressed "concerning the estates so to be sold," and to be settled accordingly, or as near thereto, as circumstances would admit.

He then declared, that it should be lawful for the trustees during their seisin of the said premises upon the contingencies after mentioned, or the persons from time to time in the seisin, to lease for three lives such parts of the aforesaid estates, as were then let for lives, except tenements of ten acres, at the accustomed rents, heriots or services, at least, to be incident to and go along with the reversion expectant upon such leases; also to let for fourteen years at the best and most improved rent, and to let coal-mines for thirty-one years at the usual reservations and payments without fine, to be incident to and go along with the reversion. He gave power to the persons seised from time to time to exchange, with an exception of the mansion-house at Ston Easton, * and directed his wife [*157] to keep the premises in repair, and if she should omit to do so, that the trustees should enter and repair with the rents and profits. He directed, that in case the said John Francis Buller and the other tenants for life in remainder respectively should not have attained the age of twenty-seven, when they respectively became entitled, then the trustees should receive the rents, issues and profits, of the said premises and of every part thereof, and apply the same towards payment of the said debts and legacies, and the surplus, if any, in the purchase of any estates in Somersetshire, to the same uses as the Somersetshire estates devised; and he directed the said tenants for life to take the names of Hipplesey Coxe. He then gave to his sisters Lady Buller and Mrs. Hipplesey, his servant Benjamin Watson, and three other persons, legacies of 100*l.* each; and 10*l.* each to his other servants living with him at his decease. He directed, that his household goods, furniture, plate, linen, books and china, in his house at Ston Easton then or at his decease should remain therein and not be sold, except such as the trustees should think not worth preserving; and that the same should go and be considered as heir-looms to that house, and be enjoyed from time to time by the persons entitled to the possession of the mansion-house. All the residue of his personal estate of what nature or kind soever he gave and bequeathed to his said trustees to sell and dispose of, and call in, the same, and apply the money arising therefrom towards payment and discharge of his said debts and legacies; and he appointed his trustees executors. Then reciting, that there might be services done by different people, and divers small sums, charities and benefactions, had been given and paid by him and his late brothers Richard, John and Charles, he authorized and empowered his trustees to pay and satisfy such person and persons for such services, when performed, and to continue such charities and benefactions, or to bestow any other, as they in their discretion should think fit; provided the same did not exceed in the whole the sum of 1000*l.*

The will was dated the 9th of June, 1794.

The Ecclesiastical Court granted probate of several papers as codicils.

1st Codicil. After excepting certain estates from being let under the power in his will, and reciting, that his father-in-

law Thomas Horner stands bound to him in a bond for 5000*l.* to be paid at his decease, "I hereby devise upon such contingency 1000*l.* of the same money to my wife Elizabeth Ann, and 1000*l.* to my sister Ann James, and the remainder thereof to pay any debt or debts, that my trustees may in their judgment think most expedient ;" and he directed none of his tenants to be raised in their rents or turned out for seven years, except for gross misconduct or non-payment of rent. This Codicil was signed by the testator, attested by two witnesses, and was dated the 9th of June, 1794.

2d Codicil. "I give and bequeath to my dear wife Elizabeth Ann, not only all, that is already given her by my will ; but in addition I give her the whole of my personal property, timber, &c. without impeachment of or for any manner of waste. I invest her with all my privileges as lord of the manor in letting, leasing, changing. My tenants I wish to continue upon my estate, as I have stated : but I give my wife power to remove them in case of waste or ill-behavior. In regard to the legacies I make the following alterations. Respecting the 1000*l.* left to my sister Mrs. James after Mr. Horner's death, I have left her an annuity instead ; therefore I revoke this, and bequeath it to my wife in addition to the other 1000*l.* I have already given her after her father's death, to dispose of this 2000*l.* as she pleases." Then, after declaring, that these annuities and legacies were not to commence till a year after his decease, and some farther directions as to legacies, "All stock upon my estate in and about my house and all timber either standing or cut down I give to my wife (indeed I apprehend them all to be included as personals) for her natural life. The sum I have allowed for charities I desire she my wife may dispose of, as she best knows my wishes. It is my ardent wish we may long live together : God grant we may : but if I die before her, I leave my wife all I am possessed of in my estates real and personal for her life without impeachment of waste ;" and if she shall die, before his heir is of age, he directs her to appoint a person to take care of Ston

[* 159] Easton House with the furniture and stock, * and to keep up the walks and premises. Dated the 14th of January, 1795. Signed by the testator and attested by three witnesses.

3d Codicil. "Memorandum, to alter my will in regard to the personals. My wife to possess them all during her life ; carriages, horses, stock of all sorts, furniture, &c. none sold till after her death : then according to last will. I give her free use of cutting timber, &c. if not already done, to be observed and executed in case I die (H. H. Coxe) shall give her my directions and wishes." Dated the 14th of June, 1795.

4th Codicil. "Farther alterations to be made in my will. As I wish my wife, in case I die, to live as we have done together at Ston Easton, let her keep up every thing, servants, &c. &c. and cut timber without impeachment of waste : and in letting estates and changing, &c. it should be done always by the trustees consulting with her and her pointing out. All live and dead stock to be

her's ; and all arrears of rent due she is to receive for her use ; and so to continue to those in trust my executors. This is my will, &c. H. H. Coxe." Dated the 15th of July, 1795.

5th Codicil. " Broderip to revise my codicils as soon as I get home. By it I wish to convince my family and friends the great love and high opinion I have for my wife. I give and bequeath her all my estate ; which after her death will go according to my will. I give her also for her entire use the whole of my personal property, except books, plate, and linen, which I think should go as heir-looms. 2000*l.* she is to have after her father's death, as I have stated. The two annuities and legacies are not to be paid till an entire year and a half after my death. This is my will ; and the quibbling lawyers must be prevented from torturing my true meaning. H. H. Coxe, Cirencester and Stow, July 16th 1795."

" Weston to be rose 40*l.* or turned out. All my tenants to be served the same, unless they lower their commodities to the poor. To take this into consideration ; and those that come after me to raise them or dismiss if they resist. H. H. Coxe."

The 5th codicil was written on a leaf in a very small [*160] pocket book. The bill was filed by the widow.

The questions arising upon these instruments were, 1st, Whether any part of the real estate except that of Midsomer Norton was liable to the simple-contract debts, legacies and annuities : 2dly as to the disposition of the personal property to the wife ; what interest she took ; whether it was a general disposition, or specific and exempt from the debts and charges ; and whether, real estate having been subject to the debts and other charges, any part of the personal property could be withdrawn so as to increase the burthen upon the real estate by an instrument not duly executed to charge real estate according to the Statute of Frauds. 3dly, Whether any thing could be done under that part of the will relating to charities.

It was contended upon the first question, that the word " only " in the disposition of the Midsomer Norton estate amounted to " no more," and restrained the generality of the former charge ; and that the exception of the coal-mines of the Midsomer Norton estate, which are to go with the other estates, showed, he did not intend the latter to be sold. *Thomas v. Britnell*, and *Ellison v. Airey*, 2 Ves. 314, 568, were cited.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. This cause comes before me upon a will and several very inaccurate codicils, of which the Spiritual Court has thought fit to grant probate : consequently they are all to be taken as the foundation of the decree. The last codicil does not seem intended by the testator for more than a memorandum, that it would be necessary to have the codicils revised : but his name being to it, the Spiritual Court have thought fit to grant probate ; therefore I must take it as part of the will. I concur in the opinion dropped at the Bar, that it is now almost absolutely necessary, that the Legislature should come to some

regulation as to the form necessary for wills of personal as well as real estate, (a) from the habit, the Spiritual Court has got into, of granting probate of all the loose papers, that can be found, and sending them to the Court of Chancery to be construed (1).

Upon the will, which upon the whole is by no means inaccurately drawn, no question arises as to the personal property being [*161] liable to the debts and legacies; for it is expressly declared, that what is not specifically given is liable. The only question upon the will is, whether upon the whole he meant the whole real estate at all events to be subject to the debts and legacies. As to the simple contract debts, unless it can be collected from the will, that he intended the whole real estate to be liable, they no more than the legacies shall be a charge upon it. I believe, the estates devised were all, that he had. The word "towards" in the disposition of the residue of the personal estate is very material; showing, he did not think that residue would be sufficient for his debts and legacies. It is clear upon this will that he meant, all his debts should be paid: first, that his personal property except what was specifically given should be applied, then that the rents and profits of his estates should be applied, as the law would have applied them if not directed, to keeping down the interest of securities affecting them: then after a general charge upon all his estates he points to the Midsomer Norton estate; and even then, when giving an absolute power to sell that, he wishes, if possible, to keep the coal for those, who are to have the other estates. He has then directed, before recourse is had to any other part, that the rents and profits to accumulate, till the devisees attain the age he has fixed, shall be applied. But is this any thing more than pointing out what shall be applied first, and that only if that application should be insufficient, the rest shall be liable? Having well considered the two cases cited, I am perfectly satisfied, I should do great violence to the construction of the will by holding, that he had not subjected all his real estates to the payment of such of his debts and legacies, as the part first pointed out should not be sufficient to satisfy. He first points out the Midsomer Norton estate: as to the rest he leaves it clear, that they should do it by mortgage, and not by sale, unless it could not be done any other way. Therefore it is not a restriction, but only an indication of an intention to discharge them by the real es-

(a) It was not until 1 Victoria, cap. 26 § 9, that the British Parliament prescribed the same form for wills of personal property and of real property, by declaring that "no will shall be valid, unless it shall be in writing and executed in manner hereinafter mentioned, that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." And it is declared in § 1, that "the word 'Will' shall extend to a testament, and to a codicil, and to an appointment by will, or writing in the nature of a will," &c. See, *ante*, note (a) to *Ellis v. Smith*, 1 V. 11.

(1) See the opinion of the Lord Chancellor to the same effect, *post*, vol. iv. 208, in *Matthews v. Warner*; and vol. v. 284, 5, *Beauchamp v. Earl of Hardwicke*.

tate, if the personal is not sufficient; to be done first by the absolute sale of the Midsomer Norton estate, and the application of the rents and profits, which he has directed to be applied: but it is not to be supposed that the general charge shall totally fail, if that is not sufficient: a construction, the Court would very reluctantly make, and which in this case would be clearly against the intention. All the real estate therefore is subject to the debts and legacies.

* The next question is, what part of the personal estate [* 162] is given to the wife, not subject to the debts. It arises upon these extraordinary codicils. The first is chiefly with regard to the mode of managing his real estate: but it is ineffectual as to that, because not duly attested. It also gives two legacies of 1000*l.* each out of a debt, part of his personal estate. Upon this codicil his wife is left in the same situation as she was. Upon the second codicil, which is duly attested, it is clear, he did not intend to give her the absolute interest in the personal estate, and that in the gift of the personal property he had not included the debt of Horner. He then comes to an explanation of what he meant by personal property; and he has corrected and explained the first words; showing, he meant she should only have it for life. Then comes these extraordinary words: "I leave my wife all I am possessed of in my estates real and personal for her life without impeachment of waste." It is lamentable to be obliged to say what he had in his head. This is perfectly clear; that if the latter part is to explain the former, all I can collect is, that she is to have the whole both real and personal for life; but if she takes it in that way, she would take the personal estate subject to debts, just as she takes the real, and not as a specific legacy. If it were to rest upon this codicil, I should be of opinion, that as to the stock and movable property there mentioned, they are specific; but as to the general personal estate, the 3000*l.* remaining of Horner's debt, and all the other personal property he might have, she would be entitled only for life to the residue beyond the debts. The third codicil is said by the spiritual Court to be part of his will and to have altered it, though it is only a memorandum of an intention to alter it. I confess, I am astonished to see this proved as more than a memorandum of what he intended to do. It is only sending things to make confusion in this Court. The fourth codicil looks more like testamentary. The concluding part "and so to continue," &c. is mere nonsense. I must suppose, he meant not only to give her a life interest in the live and dead stock, but to give it absolutely, and all arrears of rent. That, I believe, was all the personal property he had, except the remaining debt of 3000*l.* from Horner. He was conscious, he had made very unintelligible codicils. Being at a distance from home he writes in his pocket book, that Broderip is to revise them as soon as he gets home. "By this" (that is the revival) "I wish to convince," &c. I believe, the words "as I have stated" must apply to the two sums of 1000*l.* given to her by the first and second codicils. The great question arises upon this

last codicil. It is contended, that though the words are "for her entire use," it was not meant, that she should have the absolute interest, but only the free and uncontrolled use during her life; and it was said, that these words were to distinguish between the absolute use and the use as heir-looms; which she could not remove from the house to which they were attached. I cannot give so confined a sense to such very large words. I must understand them the absolute use, unfettered, unlimited, either as to duration or enjoyment (1).

Then comes a very material question; what he did mean by the whole of his personal property. When upon all these instruments we see his anxiety to increase his bounty to his wife, which is the peculiar object of this codicil, it is not a strained construction to suppose, he meant to give her the absolute interest in all that personal property, of which he had before given her a restrained and limited use; and though I dare not without something else make that construction, it is supported by what follows as to the 2000*l.*; and I will, if I must construe this, put that construction upon it, which, as far as such materials will afford a construction, I am satisfied must have been his meaning. It is clear, he did not intend to include the 5000*l.*, which was to come at the death of his father in law; for the other words would be inconsistent and absurd, if he so meant. When I consider what personal property he had before given, the words "for her entire use," the recital that 2000*l.*, part of the 5000*l.*, would belong to her as before stated, that is, the other 3000*l.* would go to pay his debts, and that he only meant her to have 2000*l.*, I cannot conceive, the 5000*l.* would be included. If he had given her the whole, he could not give her part. Therefore the whole of his personal estate is given to her, except that sum of 3000*l.*

I have now only to take notice of one argument, which I think of no validity; that where the testator has subjected his real estate in aid of his personal estate, which is the case here, he cannot by a subsequent will unattested give away any part of his personal estate, so as to increase the load upon the real estate, or rather he cannot take away from the payment of his debts any part of his personal estate. He certainly may increase the amount of the charge [* 164] with regard to legacies. That question was long * agitated, and caused some doubt, as to legacies introduced by a subsequent will unattested, where the real estate was charged in aid of the personal: but it is now determined, that it is a charge of all future legacies given in any way that legacies can be given (2). This is only a specific legacy of that part of his personal estate: namely, all except that sum of 3000*l.* It is as much exempted from his debts as a specific sum. That part of his personal property, that either by gift or will he gives away, he means to exempt. There-

(1) *Rawlings v. Jennings*, vol. xiii. 39.

(2) *Ante*, vol. ii. 236, and the cases there cited.

fore an unattested will is sufficient to give away any part of his personal property. As between the executor and creditor that question cannot arise : but it will as to the heir, who has no right to complain. So the creditor will not wait for the application of the rents and profits, the fund pointed out next after the Midsomer Nortoft estate : but those rents and profits must reimburse.

As to the charity, I am afraid I cannot establish it for uncertainty. It is void as to the real estate certainly ; and as a legacy out of the personal, how long is it to be ? He was an annual subscriber as long as he pleased. I cannot establish such charities. He meant to recommend only ; it is not mandatory. The words are "authorize and empower." It was to exempt the trustees from being called to account for doing it. I will say nothing about the charities.

1. THE loosest documents have been admitted to *probate*, as testamentary dispositions of property, by the Ecclesiastical Courts ; and by the sentence of those Courts the Court of Chancery is, to that extent, bound. *Downing v. Townsend*, Ambl. 280, 595 ; *Lynn v. Beaver*, 1 Turn. 67 ; *Druce v. Dennison*, 6 Ves. 397 ; *Beauchamp v. Earl of Hardwicke*, 5 Ves. 285 ; *Eden v. Smyth*, 5 Ves. 354.

2. As to the effect which an unattested codicil may have on lands, where a testator has, by a duly attested will, created a general charge on his real estates for payment of debts and legacies, see, *ante*, note 5, to *Habergham v. Vincent*, 1 V. 68. With respect to the inclination of Courts of Equity to lay hold of any indication of a testator's intent that his real estates shall, if wanted, be applicable to the honest purpose of paying his debts, see notes 1, and 4, to *Kidney v. Cousmaker*, 1 V. 436, and the notes to *Kightley v. Kightley*, 2 V. 328.

3. Words of recommendation in a will are, as general doctrine, considered mandatory ; but that general rule admits exceptions. See note 2, to *Pigott v. Bullock*, 1 V. 479.

BOWERSBANK v. COLASSEAU.

[ROLLS.—1796, JUNE 23.]

THE Court will not interfere with the Master's appointment of a consignee unless upon special grounds and a strong case. (a)

AN estate in the West Indies was conveyed to five trustees, in trust as soon as possible to sell, and apply the produce in payment of several incumbrances ; the trustees to manage in the mean time till the sale. All the trustees died except Charnock. Adams, a partner in the house, that was the consignee of the trustees, was executor of Dalling, one of them. After several years, no sale having

(a) The Court will not disturb the Master's decision, merely because it may think he might have made a better selection among the several candidates proposed. *Matter of the Eagle Iron Works*, 8 Paige, 385 ; S. C. 3 Edw. 385. If either party is dissatisfied with the appointment by the Master, the proper course is to make a special application to the Court for an order to set aside the Report, or that the Master review his decision. But the Court will not set aside the appointment made by him, unless the person selected is legally disqualified ; or his situation is such as to induce a belief that the interests of the parties will not be properly attended to by him. *Ibid.* 1 Barbour, Ch. Pr. 668, 667.

taken place, a bill was filed by a mortgagee ; and a decree was made, which was not prosecuted. Another bill was filed to carry on that suit. The Master having appointed Bowersbank consignee, several petitions were presented ; the object of which was to remove Bowersbank, and that Adam might be appointed the consignee. [* 165] * It came on originally by motion before the Lord Chancellor, who thought it a proper subject for a petition.

MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN]. The argument did not go quite the length of the purpose of the petition ; which is to remove Bowersbank and appoint Adam : but it pressed, that the Master should review his report. The only question is, whether consistently with the practice of the Court the facts are sufficient to induce the Court to remove Bowersbank, or to interfere in any degree with the report. This is said to be a very unusual application. I should be sorry to encourage such applications. The reasons of the Master's Judgment are so nice, that the consequence would be, every appointment would be brought before the Court. This is so much in the power of the Master, that the order is, that he shall appoint, not approve, as in the case of a guardian. The appointment of a receiver or consignee is absolute ; unless disturbed by the Court on special grounds. Therefore it is admitted, that it must be a very strong case. The attempt has totally failed to prove, that Bowersbank is not a proper person ; though perhaps he may not be so well qualified as Adam from the nature of his concern in a West India house. There is nothing to show, the former was improper ; and he was approved by the persons most materially interested in the estate. I cannot therefore remove Bowersbank as an improper man. The next question is, whether Adam is so much more proper with regard to the advantage of the estate as to entitle the Court to direct the Master to revise the report. It is said, this is not the usual case of coming to desire, that the Master shall prefer one man to another ; but that the Master proceeded upon a mistaken notion in laying down a rule ; and would have appointed Adam, if he had not thought him disqualified upon the rule, he had laid down, being an accounting party in the cause ; and therefore it is proper, that it should go back, that the Master may consider, whether he has not applied the rule in an improper manner. I have looked attentively to see Adam's situation ; and I am free to say, that though I think, he does stand in no other character than merely as an accounting party, as consignee and representative of another accounting party, I do not think, that alone would have prevented me, if I had been the Master, from appointing him : but I do not, considering his situation, think fit to send it back at a great expense merely to see, whether the Master will appoint another consignee. It is now said, and I do not like that, that Charnock never was [* 166] served with a subpoena, * and consequently was not bound by the decree. The trustees made a consignee of their own very properly. How came Charnock to carry in a proposal for a consignee ? He himself proposed Adam. If this is insisted on, I

will have motion made, that he shall be made a party. He is a mere man of straw as surviving trustee; and may be compelled to deliver up possession of the estate; and a receiver may be appointed. If he had no decree made against him, it is high time, such a bill should be filed. But I consider him as a party. The only ground of preference, that I see, is, that he approves of Adam; and having acted under the decree he now says, he was no party to it. Therefore, though perhaps I should have appointed Adam as a more proper person than Bowersbank coming in as a new man, who will certainly be under difficulties, though not so much as is conceived by Adam, I shall dismiss all these petitions. The mortgagee, who filed the bill, is the first person interested; and his approbation ought first to be attended to: though I do not say, the Master is to be determined by the approbation of any particular person.

THAT the Courts will never, without very special grounds are shown, interfere with the judgment of the Master in the appointment of a receiver, see, *ante*, note 2, to *Thomas v. Dawkin*, 1 V. 452.

BROWN v. CLARK.
HOFFMAN v. CLARK.

[ROLLS.—1796, JUNE 22, 24.]

TESTATOR gave his sister M. and his brother W. the interest of the residue equally: at the death of M. one half of the principal to her children; her husband by no means to have any part, but to be entirely for the children; if none, to W.'s children; and after the death of W. and his wife the other half to his children; and he excluded his eldest brother from any benefit: M.'s life interest is not to her separate use: the interest of the other moiety during the lives of W. and his wife would have vested in W. and therefore lapsed by his death in the life of the testator. (a)

Assignees of bankrupt taking his wife's fortune out of the Court must make a provision for her. They consented to give her half, (b) [p. 166.]

GEORGE HOFFMAN by his will after some legacies gave to his sister Mary Brown and his brother William Hoffman the interest of the residue of his personal estate, whatever sums of money, he might have in the East India Company's treasury and Bank of England in the names of trustees, likewise all other of his substance, in whose hands, custody, possession or keeping, it can or may be found, "which sum or sums, the interest to be equally divided between

(a) This case is said to show how nicely language is sometimes interpreted to sustain the marital rights of the husband. 2 Story, Eq. Jur. § 1383, note.

(b) Assignees take the property subject to all the equities which affect the bankrupt; and so would be bound to make a settlement upon the wife out of her *chooses in action*, and equitable interests assigned to them, as the husband would be bound to make one. See 2 Story, Eq. Jur. § 1411, and cases cited; *Mumford v. Murray*, 1 Paige 620; *Smith v. Kane*, 2 Paige, 303; *Van Epps v. Van Deusen*, 4 Paige, 64. See, *ante*, note (d) to *Bell v. Montgomery*, 2 V. 191.

them; the principal to be lodged in the Bank or some secure place; at the death of my sister Mary Brown, then one half of the principal to be equally divided between her children: the husband of the said Mary Brown by no means to have any part whatever, but to be entirely for the poor children; and should she have none alive, in that case the said sum then is to become the property of [* 167] my brother William's children *equally to be divided: and after the death of the said brother and his wife, then the other half of the principal is to be equally divided among his children." He then excluded his eldest brother Lewis from any benefit from his estate and will; and appointed Clark one of his executors.

Daniel Brown, the husband of Mary Brown, became a bankrupt; and William Hoffman died in the life of the testator. The questions were, whether the share of Mary Brown was given to her separate use for life: 2dly, as to the disposition of the share of William Hoffman during the life of his widow.

Mr. *Lloyd* and Mr. *Harvey*, for Mary Brown, and Mr. *King*, for one of the next of kin. Upon the first point, the husband has no title to any part. The words will have no effect, if not to give it to the separate use of the wife for life.

As to the second point, there is no necessary implication for the widow. It is clearly an intestacy during her life in the event, that has happened.

Mr. *Piggott*, for Anne Hoffman, the widow. In *Willis v. Lucas*, 1 P. Will. 472, a devise was construed upon principles exactly applicable. The intention here is to exclude the next of kin, as it was there to exclude the heir. It is a case of strong implication.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. Upon the first point it has been contended, that there is a plain evident intention, that the interest should be to the sole and separate use of Mary Brown. I profess, upon reading it over and over again I can hardly bring myself to think, such an argument has any foundation whatever; for nothing is given to her but the interest: no part of the principal; and it is given in words, that cannot by any ingenuity be tortured to deprive the husband of that right, the law gives him. It is said, the words must mean, that the husband shall have no part whatsoever of the interest before given; otherwise they are unnecessary and superfluous. That is admitted: but it is no uncommon thing for the testator to suppose, the father would have the fingering of the money given to the children; and it might [* 168] be inserted to *prevent that. I cannot apply it to any thing but the last antecedent. What is to be divided among them? Not the interest; for they had no share of that. The interest only therefore is given to the wife; and there being no restriction, it must be subject to the right of the husband: but his assignees must make a provision for the wife, before they can call it out of this Court (1).

(1) *Oswell v. Probert*, ante, vol. ii. 680, and the note in page 609.

Upon the second question, what is given to his brother? It is an absolute gift to him of the interest till the death of himself and his wife, when the principal is to be divided; which interest during the life of his wife would go to his executors. This is a desirable construction, to have enabled him to provide for the children; and it is not unnatural to suppose, the testator intended it; but the testator having survived his brother, it became lapsed; and therefore all the argument, I have heard, is out of the question. The implication can never arise, but where the property is undisposed of; and here if William Hoffman had survived the testator, it would have been a vested interest in him and his executors.

The assignees of the bankrupt consented to give half the property to his wife.

As to the right of a *feme covert* to have a provision allowed to her by her husband's assignees, before they will receive any assistance from Equity in getting possession of property which belongs to the husband only in right of his wife, see, *ante*, the note to *Burdon v. Dean*, 2 V. 607.

WILLINGHAM v. JOYCE.

[ROLLS.—1796, JUNE 25, 27.]

BILL for specific performance of an agreement to grant a lease to the Plaintiff would on evidence of his fraud, misrepresentation and insolvency, have been dismissed with costs, if not compromised. (a)
The Court would not execute an agreement to grant a lease to a man, who had committed a felony, (b) [p. 169.]

THE bill was filed for specific performance of an agreement executed according to the statute of Frauds to grant a lease to the Plaintiff; to whom the Defendants had given possession on hearing a good character of him from Mrs. Gresse, under whom he rented the house, he last lived in, and to whom he referred them. They refused to grant the lease, and brought an ejectment, on the ground of the fraud, misrepresentation and insolvency, of the Plaintiff; and they went into evidence to this effect. Upon the application of the Plaintiff the Defendants said, they would not let their house to any

(a) Equity will not decree specific performance in cases of fraud or mistake; or of hard and unconscionable bargains; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust; or where a performance has become impossible; and, generally, not in any cases, where such a decree would be inequitable under all the circumstances. 2 Story, Eq. Jur. 750, 750 a, 769, and cases cited; *King v. Hamilton*, 4 Peters, 311; *Cathcart v. Robinson*, 5 Peters, 264; *Mechanics' Bank of Alexandria v. Lynn*, 1 Peters, 376; *Colson v. Thomson*, 2 Wheaton, 336, in which case the Bill was dismissed with costs.

(b) This is referred to as a *dictum* in 1 Maddock. ch. 421, note.

one, who would let lodgings: he said, he did not wish that; as he was an attorney, and wanted it for himself; that his family consisted of his wife, son, clerk and servant; that he had lived nine years in the house of Mrs. Gresse, and only quitted it, because she wished to live in it herself; that he paid his rent quarterly, and they would be satisfied with the character, she would give him; but they must call that evening, as he was to give an answer that evening about another house; and was going out of town the next morning. Notwithstanding this representation he had been tenant to Mrs. Gresse a very little time; and had been distrained upon for rent and taxes. He would not quit her house, till she consented to refund 5*l.* he had paid her, and accept his notes for the rent due; which were never paid. Upon going away he did wanton damage to the house, and behaved very ill. Mrs. Gresse gave him a character to the Defendants in order to get rid of him; but afterwards told them the truth. These particulars were proved by her. It was also proved, that he let lodgings; and the Defendants upon receiving this information offered to give up the rent, if he would quit the house; that he was a bankrupt in 1789, and obtained his certificate the same year. A letter written by the Plaintiff, and dated June 13th 1796, was read, in which he acknowledged, that it was necessary, he should be from home, till his affairs were settled. There was also a summons to convene his creditors.

Mr. *Lloyd*, for the Defendants. The Defendants may use evidence to show, the Plaintiff is not a proper person to have a performance, as in a case of misrepresentation; and a Plaintiff has often been compelled to adopt what the Defendant has proved to be part of the agreement: *Joyne v. Statham*, 3 Atk. 388. The Plaintiff has filed a bill for performance of an agreement, which from his situation he cannot execute. There may be cases, in which the Court would not execute it; as if he had committed a felony; and the consequences are the same to these Defendants.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Certainly in the case you put I would not execute the agreement; nor would I decree a specific performance merely to give up the house to assignees (1). They could not file a bill of this kind for the house for habitation; unless they chose to take it, and be tenants, and enter into covenants. I have no doubt of dismissing the bill with costs.

[* 170] *The parties came to the following compromise: the Plaintiff to deliver possession of the house within a month, and to do no damage in the mean time: and upon performance of these terms the bill to be dismissed without costs: if he fails in them, the injunction granted to restrain the Defendants from proceeding in the ejectment to be dissolved; and the Defendants to be at liberty to apply in this Court for costs.

(1) See *post*, *Buckland v. Hall*, viii. 92.

The MASTER OF THE ROLLS desired it to be observed, that if it had not been for their coming to these terms he would have dismissed the bill with costs (1).

THE bankruptcy of a person who has agreed to purchase does not necessarily discharge the contract. *Brooke v. Hewitt*, 3 Ves. 255. See stat. 6, Geo. IV. c. 16, s. 75. And the rights of creditors under a commission, who may have been induced to give credit to the bankrupt on the faith of his known agreement for a lease, afford a principle upon which the assignees may require the execution of such lease. *Brooke v. Hewitt*, *ubi supra*. And see the 76th section of the statute just cited, which seems to settle the doubt entertained on this head in *Weatherall v. Greening*, 12 Ves. 513, and to overrule the early cases of *Drake v. The Mayor of Exeter*, 2 Freem. 183 (2d edit.), *Vandenanker v. Desbrough*, 2 Vern. 97, and *Moyes v. Little*, *Ibid.* 194, where it was resolved that the assignees of a bankrupt should not have the benefit of a covenant for renewal of a lease to the bankrupt. It appears, however, to be now determined, that if an agreement for a lease has been reduced into writing, it may be enforced by the assignees of the intended lessee; but that, if it rests in parol, though there may have been such acts of part performance as would entitle a solvent lessee to a specific execution, upon the ordinary doctrine of Courts of Equity, yet the case does not come within the scope of the statute. *Ex parte Sutton*, 2 Rose, 86. This determination rests on strong grounds, for assignees who have taken a lease as part of the estate of a bankrupt may, it seems, if they find it burthensome, assign to a beggar: *Onslow v. Corrie*, 2 Mad. 345: and it would be hard to put it in the power of the assignees to sacrifice, perhaps wantonly, the interests of lessors; there can be no sufficient reason why, under such circumstances, the Statute of Frauds should be further broken in upon. The insolvency of a proposed tenant is always a weighty objection to a specific performance of an agreement for a lease. *Buckland v. Hall*, 8 Ves. 95; *O'Hertiky v. Hedges*, 1 Sch. & Lef. 130; *Brooke v. Hewitt*, 3 Ves. 255; *Boardman v. Mastyn*, 6 Ves. 467.

(1) *Wall v. Stubbs*, 1 Madd. 80. For the cases, in which evidence has been admitted upon agreements within the Statute of Frauds, and the distinction between supporting and resisting a specific performance, see the note, *ante*, pages 38, 9.

the 1st of February, 1790; giving as a reason the probability of being deprived of the means of taking measures and pursuing his remedy against the Plaintiff's property in St. Christopher's that year; the Courts there being open only from March to August: but that was refused by the arbitrators. The Defendant never concealed his intention to proceed against the property in St. Christopher's; and the Plaintiff knew it: as he had no other property, he could make available. Upon the Plaintiff's making default the Defendant upon the 1st of March, 1790, wrote to inform him, he had waited at the place appointed, and requested to know, if the Plaintiff had any thing to propose upon the subject; who the next day wrote in answer, that it was totally out of his power to pay directly; and he had no mode to offer to accelerate payment, unless the Defendant would treat for a West India mortgage mentioned in the letter.

On the 3d of March the Defendant wrote to the Plaintiff, that he would treat for the security proposed; to which the Plaintiff wrote the answer stated in the bill. They met afterwards at the Cannon Coffee House: but no offer was made. The Plaintiff wrote to the Defendant on the 27th of April, that the gentleman, who interested himself about Pemberton's mortgage, was ill at Bath; but was better, and was expected in town; and no doubt, but a week more would finish it one way or other: that the Plaintiff had had [* 173] a long conversation with Lade about the Defendant's * proposal of buying the reversion of his estate; and that he wishes at once to end all such proposals by declaring, no circumstances of his shall make him agree to any such thing. That letter the Defendant believed was produced by his having informed Lade, who had married Lady Cranstown, both personally and by letter of his intention to proceed against the interest in St. Christopher's; with a view, that Lade might have an opportunity of bidding, if there should be an execution; which, as he was then in possession, the Defendant thought would be more beneficial for the property; and that by these means he might obtain payment. Various meetings took place between the Plaintiff and the Defendant; who represented the loss and expense of litigation. The final answer of the Plaintiff was, that he was not disposed to give any security; that the Defendant might pursue what measures he pleased against the property in the West Indies; that he was so completely ruined in that part of the world, that no step, the Defendant could take, nor any action of his, could make the Plaintiff's situation worse. The value of the estate is not so high, as stated by the bill. In 1788 Caine was the plaintiff's attorney in St. Christopher's. The judgment and execution were regular according to the laws of the island. The judgment was in August, the sale upon the 11th of November, 1790. There were no bidders; and therefore the Defendant's attorney purchased at 2000*l.* currency. By a letter, dated October 4th, 1790, from the Plaintiff to the Defendant, the Plaintiff said, he had heard, the Defendant had secured himself by a judgment against

the estate in the West Indies; and requested to know, if he would rest contented therewith: and that he had appointed Lord Kinnaird his attorney in his absence. There were incumbrances on the estate in St. Christopher's. The Governor and Council are the first Court of Error in that island; and from thence an appeal lies to the King in Council. On the 26th of April, 1790, the Defendant wrote to Lade, that he had sent out the proofs necessary for his obtaining judgment against the Plaintiff, the arbitration bond and award, to St. Christopher's, to proceed thereon, some time in March, or at least previous to the Plaintiff's letter of the 27th of April; from which the Plaintiff had ample opportunity to make defence. The Defendant wrote to Lade on 2d March, 1790, that finding himself very ill used by the Plaintiff he was determined to pursue such measures against his property, as were *likely to do him- [* 174] self justice; and requesting information, in what manner the Plaintiff's annuity was payable; so that he might judge, if he could make it liable to his demand; and requesting to converse with Lade on the subject of the Plaintiff's reversion. In March, 1790, the Defendant stated to Lade at a meeting between them what is before stated; and also that he was well advised, that by proceeding in St. Christopher's to judgment and execution not only the annuity but the reversion would be sold; and that he either had sent or would send out instructions to proceed; and he suggested to Lade, that it would be more valuable to him to buy than to any other person; and having then no view but to obtain payment he pressed Lade to become the purchaser, and explained the manner he meant to proceed to bring the Plaintiff's right and interest in the estate and annuity to sale: and said, that if his demand should not be satisfied before, the reversion would certainly be sold in 1790. Lade said he would apprise the Plaintiff of his intention. Soon after he informed the Defendant, he had done so; which the Defendant believes was the occasion of the Plaintiff's letter of the 27th of April: but he never made any proposal to purchase the reversion directly from the Plaintiff. There was no treaty between them except the proposal as to the Nevis mortgage. After that proposal the Plaintiff in his letter of the 2d of March adds, that Mr. Waddell has a security upon it; to what amount he does not know; that their accounts were to be settled by a Master in Chancery; and he hoped, every thing between them would be settled by the end of that month.

The Defendant in his answer the next day said, he was ready to listen to any reasonable proposal: but not knowing the situation of the mortgage in Nevis he could only propose a meeting to devise some plan to enforce the mortgage: and then reminds the Plaintiff "that the Courts of justice in the West India islands are only open from March to August; and that there is not a moment's time to be lost in consulting upon the proper means to be adopted for the recovery or security at least of your mortgaged property;" and then he says, he is ready to meet on the business. He believes the Plain-

tiff's letter of the 5th of March and the application to the Courts abroad therein may refer to the Defendant's letter of the 3d of March and the correspondence respecting the West India mortgage:

but he understood, they referred equally to his intention [* 175] of applying to the * Courts in St. Christopher's to recover his demand against the Plaintiff's estate. He did not before the 5th of March send instructions to proceed. A few days after that day upon his request the meeting took place at the Cannon Coffee House: but no proposal was made: therefore he considered such treaty, if it ever existed, determined. The Nevis mortgage was not an available security. Thinking the Plaintiff was amusing him, he sent out instructions to proceed upon the 16th of March. As soon as he came to London, and knew Lord Kinnaird was appointed by the Plaintiff to act for him, and before he heard of the sale, he did according to the desire of the Plaintiff inform Lord Kinnaird, that he was proceeding; that he understood from his agents, execution had issued on the judgment obtained; that Lord Cranstown's interest was levied upon, and would be sold at the time prescribed by law to satisfy the debt, unless paid before; and he repeatedly informed Lord Kinnaird, an absolute sale would take place. Lord Kinnaird never held a conversation with him to prevail upon him to accept security, nor did he understand Lord Kinnaird to mean to prevail with him to accept security till 1792; and he never declared to Lord Kinnaird, and does not believe, that during the proceeding he declared to any person, that he would at any time accept principal and interest. There were no bidders at the sale, because it was thought, the Plaintiff had mortgaged in England prior to the judgment.

There was evidence, that the Plaintiff's interest in St. Christopher's was worth 20,000*l*.

Lord Kinnaird deposed, that in the beginning of September, 1790, the Plaintiff informed him by letter, that the Defendant was taking out judgment in the island, and was resolved to plague him as much as possible: and in the latter end of that month the Plaintiff informed him, that he had written to the Defendant to know about it, and had an answer; but he did not answer that part of the letter. In the latter end of 1790 the deponent met the Defendant at a banker's, whether by accident or appointment he does not know, and conversed with him about his proceeding against the Plaintiff. The Defendant read extracts of letters from his agent, particularly one dated the 21st of June, 1790. The deponent observed, it was merely impossible, he could mean in so fraudulent a manner to attempt to possess himself of the Plaintiff's [* 176] * rights; and that if such an idea could be entertained, it would be necessary to take measures to defeat such proceedings; and thereupon the Defendant in the most solemn manner declared, he had no views whatever by the proceedings he was taking in the island of St. Christopher's beyond that of obtaining some better security for the sums due to him; and that if he should be

the nominal purchaser of the said estate, he was desirous, the deponent would understand, and he pledged himself, that he should hold himself ready to receive his debt with any unavoidable costs he might be put to in the business, and relinquish the purchase; and therefore there was no necessity for the Plaintiff's taking any steps therein, even were there time; as the Plaintiff was perfectly safe from any other consequence, except paying what was really due; and that if Lade should buy the reversion, as he was already in possession, he might give the Plaintiff some trouble. The deponent replied, that as he had full confidence in his solemn assurance as to his object, he might be the nominal purchaser; that the deponent would inform the Plaintiff of the conversation, and would do his utmost to induce him to make every effort to discharge the Defendant's demand. On the 8th of November, 1793, the deponent met the Defendant by appointment at the house of a solicitor, who offered him principal, interest and costs: the Defendant answered, he was unable to state the amount of his costs; and as he did not think he had been well used, he wished to consult his friends; and he would consider that as a legal tender.

Henry Cranstown proved, that he offered payment on the 22d of May, 1792; but the Defendant returned such an evasive answer, that Cheap, who was to advance the money, would have nothing to do with it, saying, it was clear, the Defendant would not give up his claim.

The following letters were produced and proved in the cause, besides those stated in the bill and answer.

Letter from the Defendant to his agents in St. Christopher's, dated the 5th of May, 1790: That he had written a long letter to them on the 16th of March, and sent out the bond of arbitration and the necessary proofs, in order that they might proceed with effect * against the Plaintiff's property during the Court [* 177] months: "though I have both seen and heard from Lord Cranstown, since I wrote, nothing satisfactory has been proposed; nor have I the most distant prospect of payment, except through your kind and friendly exertions:" he had a conversation with Lade concerning Lord Cranstown's annuity; which he had reason to think Lade told to Lord Cranstown; that it was in order to increase his embarrassments by making Lade think himself not safe in paying the annuity in consequence of the proceedings taken by attachment: he had received a letter from Lord Cranstown: he did not think, it required any answer, and therefore sent none: having no doubt of their becoming the purchasers of it for him for want of any other bidder, he hopes he shall thereby be able to dictate the terms of payment.

Letter to the Defendant from one of his agents in St. Christopher's, dated 21st June, 1790: This states, that an action had been entered; but Lord Cranstown being an absentee, execution could not be taken out till August; an attachment had been served on Lade to prevent payment of the annuity; Lord Cranstown's interest

stands charged only with 3000*l.*, and cannot be valued at less than 20,000*l.*, and Priddy, Lade's agent, says, the slaves, stock, &c. are worth 8000*l.* "You will have a good bargain for 2500*l.* If you do not choose it, I must treat with you for it; but I do not think, Lade's agent will let you be the purchaser."

This letter is very long; and at the conclusion there was this sentence: "The St. Kitt's property is my mark."

In another letter to the Defendant, dated in September, 1790, the same agent says, he would not before have advised the Defendant to give up on account of this prospect the advantageous settlement, he proposed to himself in the East Indies.

Letter to the Defendant from another agent, dated the 13th of November, 1790: This states Lord Cranstown's interest in the estate, and a mortgage upon it for 3000*l.* As it cannot be conceived, that Lord Cranstown would sit still and let it be sold, unless his intention is by some conveyance or incumbrance to prevent the effect of the sale, if he has not done so, great care must be taken for fear he should do any thing of the sort, and antedate the deed; for
 "when he comes to learn what has been done, though
 [* 178] only what might be expected from what you told him, * he may be driven by resentment to thwart you. This will certainly be a troublesome, expensive thing, and perhaps uncertain in the event; and therefore well worth your serious consideration."

Letter to the Defendant from the agent, who wrote those of June and September, dated the 18th of November: That he has anxious expectations of deriving something much better than payment of the debt. Upon the 11th, the estate, negroes, &c. were put up to sale. He purchased at 2000*l.* currency. He declared to the bystanders that what was to be sold was all Lord Cranstown's interest subject to the incumbrances upon it. His reason for bidding 2000*l.* currency was in order not to discharge the demand; and he bid that sum rather than 5*s.* on account of the objections, that would be made to such a price.

Letter to the Defendant from the same agent, dated the 24th February, 1791: This letter congratulates the Defendant on his success in getting the purchase. He is happy, that the opinions in England agree as to Lord Cranstown's title. Priddy had acquiesced, and means to pay the annuity to the Defendant.

Letter to the Defendant from the same person, dated the 18th of July, 1791: That Priddy made it unnecessary to proceed any farther as to the annuity, for he paid it without compulsion; but the two quarters accrued during the attachment cannot be recovered without suit. "Prudence tells me I ought not to bring him to the proof: because there is no answering for a jury's sympathy with Lord Cranstown. It might be thought a great purchase; and might induce opposition to what is now acquiesced in."

Letter to the Defendant from the same person, 11th of June, 1792: This states an incumbrance of Caine; and that considering the importance of the purchase, the inadequacy of the price, the

strong opposition to be expected on Lady Cranstown's death, the strong inclination Courts would have to assist Lord Cranstown, and the uncertainty of the law upon the colonial acts, he thought it not worth the risk for 90*l.*, and therefore purchased Caine's interest.

* Letter to the Defendant from the same person, dated [* 179] 16th of March, 1793 : Having heard that the bill was filed, he enters very fully into his opinion. He says, he should have thought, the act could not apply to a person, who had never been upon the island, and particularly, who had no tenant; but it was otherwise construed. The price was inadequate. It was to be supposed, his Lordship or his friends would buy; if not, that Lade's attorney certainly would.

This cause was argued very fully by Mr. *Hardinge*, Mr. *Graham*, and Mr. *Hart*, for the Plaintiff; and Mr. *Piggott*, Mr. *Grant*, and Mr. *Trower*, for the Defendant.

It was objected for the Defendant, that the single evidence of Lord Kinnaird could not, according to the rule of the Court, prevail against the answer (1).

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This relief is sought upon the terms of paying all such sums of money, as were due to the Defendant at the time of the judgment, and the costs and expenses he was put to in procuring and carrying into effect that judgment; and I suppose, though it is not expressly stated, upon payment of all such incumbrances affecting the same estates, as the Defendant may have become entitled to. From the moment the case was opened, and after reading the evidence, there can be no question except as to the terms of the relief; for I confess, I never saw a case, in which the relief sought was more clear; and I must forget the name of the Court, in which I sit, if I refuse to grant it. (a). I have taken great pains to look over all the proceedings, and have given a great deal of attention to the several letters referred to by the answer and given in evidence. It is much to the credit of the Defendant, and a remarkable instance of his candor, to have stated all this evidence from his confidential letters: otherwise I do not know, how the Plaintiff could have compelled him to produce them. Now upon the evidence the case is clear of all doubt as to the transaction, and the object, the Defendant had in view in getting that judgment. It does not appear, that the Plaintiff made any provision for payment of the money awarded. He was entitled to privilege of peerage; *and [* 180] therefore the Defendant had not the means of compelling performance of the award so readily, as otherwise he might; nor does it appear, that the Plaintiff had in this country any effects, upon which the Defendant might make his demand effectual. Certainly he had a right to enforce payment by all means, the law of

(1) *Ante*, vol. ii. 244, and the references in the note.

(a) The reader will here observe the vivid language of the Master of the Rolls.

this or any other country would give him. It does not appear, that the Defendant ever gave the Plaintiff any reason to suppose, he should be satisfied with the mode proposed by the Nevis mortgage; and when that security was looked into, there was no reason to suppose, it would be productive of so great a demand. Nothing is more clear, and indeed it is admitted by the answer, that the clause in the letter of the 5th of March relative to the applications to be made to the Courts abroad does not refer to proceedings to be commenced in consequence of the bond becoming forfeited, but to make effectual the mortgage, the Plaintiff offered. The letter of the 27th of April is very important; because it was noticed and acted upon by the Defendant in his letter to his agents of the 5th of May. From the former it appears, that some conversation had taken place, which is much relied on by the answer, as to the Plaintiff's parting with his reversionary interest to satisfy this demand; but it is equally clear, he was not disposed to do so; and he absolutely declared, he would not concur in that measure at least to satisfy it. The letter of the 5th of May from the Defendant to his agents shows, he had endeavored to make Lade think himself not safe in paying the annuity to the Plaintiff; and states, that it was to increase his embarrassments. If the Defendant had proceeded, as he says, with a view to dictate the mode of payment, he would have done right. But it is clear, the Plaintiff had no idea, that it was in the Defendant's power to force a sale of the estate. From the letters of June and September from the agent it is clear, the object of the Defendant was, not only to obtain a sale to satisfy his judgment, but a sale, at which he was to be the purchaser upon such beneficial terms, that it would be worth his while to forego other prospects in life; namely, the settlement referred to in the East Indies. From the letter of the 13th of November from the agent and the defence I am to understand, that if 5s. had been given, it would be equally competent to him to insist, that that should be the price, and that he had as good a right to keep it as he has now. Such a picture of a sale under a judgment so insisted upon is such, as I should not have thought could have been exhibited in a Court of Justice [* 181] with a serious intention, supposing, *that any law of any country should be perverted to such a purpose.

It is material to see, what was the law, to which the Defendant applied for enforcing payment. He could not with effect in this country: but he found out this interest in that island; where there was an act of assembly authorizing any creditor to proceed against an absent debtor by writ of summons; (a) and in case the Defendant shall secrete and conceal himself, so that the Provost Marshal

(a) The exercise of jurisdiction against absent foreigners has been questioned; as where it is by a citation *vis et modis*, or, by what is called in the Scotch law the process of "horning," or otherwise. See Story, Conflict of Laws, § 546—549; *Bissell v. Briggs*, 9 Mass. 468; *Taylor v. Phelps*, 1 Gill & Johns. 492; *Bequet v. McCarthy*, 2 B. & Adolph. 951; *Don v. Lippman*, 5 Clark & Finell. 21; *Douglas v. Forrest*, 4 Bing. 686; *Picquet v. Swan*, 5 Mason, 35.

or other person summoning cannot find him, then one summons and a copy of the declaration left at the last usual place of abode or upon the freehold of the Defendant and another nailed up at the Court-house door shall be good and effectual. He thought fit to proceed on this law; and I must now suppose, he had a right so to do; though the Plaintiff, I think, was very ill advised for not trying whether any relief could be given in the island: a summons left upon the freehold, as it is called, of a person, who had no freehold in possession; who had no tenant, upon whom this constructive notice could be served; and the creditor here knowing this avails himself of this law; which I do not mean to quarrel with: but neither that law nor any law in his Majesty's dominions could be, I hope, carried to the extent of authorizing a sale without either actual or constructive notice.

It is perfectly clear, the Plaintiff had no conception, that his estate was to be sold. He knew, the Defendant had a judgment; and thought, it would be a security to him; and in the letter of the 4th of October hopes, he will be content with that. I fully admit he was not bound to attend to that at all. That is the letter of a man certainly ignorant of the extent, to which the Defendant's proceedings might possibly have brought the estate. Lord Kinnaird's evidence goes to an apology for the Plaintiff's not proceeding; though I may not be able to bind the Defendant by it. The Defendant denies, that he ever had such conversation with Lord Kinnaird, as assured him, that he would be ready to receive his debt; but he does not say, he told Lord Kinnaird, that if he got the estate, he would keep it; which, I think, would have been a proper thing to have done. That does not appear upon his answer. The sale was brought on as rapidly as possible. It was sold without any particular; and the agent of the creditor was the person to tell the bystanders, what was the interest to be sold, and that he meant to bid for; and it was sold subject to any demand by any conveyance or incumbrance by the Plaintiff in England. Upon such a sale nobody else would bid: he could *be the only bidder. [* 182] From the nature of it it could not be for a fair price; being only a chance of what he might have. I will not permit such a sale to stand except for what is actually due. From the agent's letter in July, 1791, it appears, there was some doubt, whether it was wise to be stirring in this business. There was no correspondence from that till May and June, 1792. That requires some explanation. I cannot help saying, the Plaintiff was somewhat negligent: probably it was from want of power. The Defendant did not take particularly active steps to confirm his title or bring it to an end; but it appears, he had been looking out for an outstanding term to fortify his title; which he thought would do better than the sale. How could it possibly be supposed, as mentioned in the agent's letter, that the Plaintiff or his friends would buy it, if he did not know it? It is plain, it was done behind his back at least.

Upon the whole it comes to this : that by a proceeding in the island an absentee's estate may be brought to sale, and for whatever interest he has, without any particular, upon which they are to bid : the question is, whether any Court will permit the transaction to avail to that extent. It is said, this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued very sensibly, that it is strange for this Court to say, it is void by the laws of the island or for want of notice. I admit, I am bound to say, that according to those laws a creditor may do this. To that law he has had recourse, and wishes to avail himself of it ; the question is, whether an English Court will permit such a use to be made of the law of that island or any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt, for which the suit was commenced, and for which only the sale could be holden. It was not much litigated, that the Courts of Equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here. *Archer v. Preston*, *Lord Arglasse v. Muschamp*, *Lord Kildare v. Eustace*, 1 Eq. Abr. 133. 1 Vern. 75, 135, 419. Those cases clearly show, that with regard to any contract made or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, * this Court will hold the same jurisdiction as if they were situated in England (1). Lord Hardwicke lays down the same doctrine, 3 Atk. 589. Therefore without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings as in a Court of law, or saying, that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage, he got by the nature of those laws, to proceed behind the back of the debtor upon a constructive notice, which could not operate to the only point, to which a constructive notice ought, that there might be actual notice without wilful default : that he has gained an advantage, which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this : this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice.

It is said, what if the sale had been to a third person? I am glad, I have not to determine that. A third person might have a great deal more to say, than this Defendant can. He might say, the law of the island authorizes a lottery ; and having bid he has a right to retain it. But this Defendant has no such right except for

(1) *Post*, *Jackson v. Petrie*, vol. x. 164 ; *White v. Hall*, xii. 321.

the purpose of paying himself the debt. The Crown never thought of availing itself of an outlawry to keep the estate or give it to the creditor. In the island it has been thought expedient to grant a sale in order to make payment of debts speedy (1): but then it shall be only for that purpose, and subject to redemption. I have some doubt as to what has passed since the sale. If with full knowledge the Plaintiff had forborne to seek his remedy, and had lain by to the Defendant's disadvantage, merely for the sake of his own accommodation, I should have thought, he had forfeited his right to redemption. If the Defendant had said, he must be paid by a certain time, or he would avail himself of his purchase, he had a right to do so; but that does not appear. In November, 1792, some offers were made, which I do not wonder he refused; and then immediately the bill was filed. The question is only, whether the Plaintiff is too late. I have no scruple to say in this cause, it would be unconscionable to permit the Defendant to avail himself of the laws of this island to procure this estate for any other purpose than to pay him his own debt. It is clear upon the correspondence, he did mean to take an advantage, which the law * of the country was not calculated to give him, but [*184] of which he might avail himself. It is not clear, that he did wrong in selling behind the Plaintiff's back; because there was a possibility of the Plaintiff's defeating the judgment by some act here; therefore he was right to go to a sale: but then he ought to have said, he was willing to be redeemed. He is therefore fully entitled to all the costs of the proceeding in that country; but the use he has made of it, under all the circumstances I cannot permit.

Therefore on payment of the money awarded, and such sums as the Defendant has paid in the island, with interest at 5 per cent. he must reconvey, subject to other incumbrances. Take an account of what is due for principal and interest, and also of what is due upon the payments of the annuity with interest; and reserve the costs (2.)

1. THAT the testimony of a single witness may prevail against the defendant's answer, when the evidence given by the witness is supported by collateral circumstances; see, *ante*, note 2 to *Mortimer v. Orchard*, 2 V. 243.

2. The foundation of the decision in the principal case was fraud; and upon that ground Lord Erskine, C. declared his perfect concurrence in the decree. A general averment of fraud, however, will not authorize the courts of this country to interfere, after a sale of a mortgaged colonial estate has actually taken place, under the process and judgment of a local court having a competent jurisdiction: to justify a Court of Equity here in overhauling the transaction, the facts constituting the alleged fraud ought to be so stated, that issue can be taken thereon. *White v. Hall*, 12 Ves. 324. The sentence of a court of a foreign nation, is, like the sentence of a court in one of our own colonies, generally speaking, conclusive and binding upon the Court of Chancery here; supposing, of course, in both cases, the Court which pronounces such sentence to have been of competent jurisdiction. *Burrows v. Jemino*, 2 Str. 733; *S. C. Mosely*, 2; *Bluet v. Bampffield*, 1 Cha. Ca. 237. And also, that the cause was there fully and peremp-

(1) Statute 5 Geo. II. c. 7.

(2) *Post*, vol. v. 277.

torily determined; leaving nothing to be ascertained by ulterior proceedings. *Newland v. Horseman*, 2 Cha. Ca. 75.

3. As a general rule, a mortgagee is, no doubt, entitled to use *all* his remedies for the recovery of his debt; and may proceed on his bond at law, and on his mortgage in Equity, at the same time. *Rees v. Parkinson*, 2 Anstr. 497; *Schoole v. Sall*, 1 Sch. & Lef. 176. But that general doctrine must be limited, in its application, to cases in which the proceedings in Law and in Equity are both in the same country, (*Pieters v. Thompson*, Coop. 294,) and the means of preventing a fraudulent use of multifarious remedies are at hand; for instance, if the mortgagee recover here upon his bond, that would be an answer to his suit for foreclosure, if such suit were also brought here; if he recovered partial satisfaction only, credit for the amount recovered, whatever that was, would be given to the mortgagor in taking the accounts; and, on the other hand, if the mortgagee first proceed to a foreclosure, and having got a decree to that effect, subsequently brings an action upon the bond, the foreclosure will thereby be opened. *Perry v. Barker*, 8 Ves. 530; *S. C.* 13 Ves. 204; *Lyster v. Dolland*, 1 Ves. Jun. 434. But if the two proceedings were going on simultaneously in two different countries, the mortgagor might be adjudged to make a two-fold satisfaction.

4. Although titles to lands in the West Indian colonies are, regularly, to be decided upon, in the first instance, by the courts of local judicature; it may, incidentally, become necessary to decide such questions here. *Attorney General v. Stewart*, 2 Meriv. 156; *Roberdeau v. Rous*, 1 Atk. 543. And with respect to contracts as to lands in the British colonies, there is no doubt of the jurisdiction of the British Court of Chancery, when the persons who have contracted are in this country. *Foster v. Vassall*, 3 Atk. 589; *Toller v. Carteret*, 2 Vern. 495; *Earl of Derby v. Duke of Athol*, 1 Ves. Sen. 204; *Jackson v. Petrie*, 10 Ves. 165. For though the Court cannot enforce the execution of its judgment *in rem*, that is not an objection against a decree being made in such a cause; as the Court can enforce its decree *in personam*, by process of contempt and sequestration. *Penn v. Lord Baltimore*, 1 Ves. Sen. 454; *Vernon v. Bethell*, 2 Eden, 110. To injoin another court, of competent jurisdiction, from entertaining the question, would be an improper assumption of authority. *Kennedy v. Earl of Camilis*, 2 Swanst. 319; *Lowe v. Baker*, 2 Freem. 125. But if the parties are in this country, to injoin them from taking proceedings elsewhere, would be quite regular. *Harrison v. Gurney*, 2 Jac. & Walk. 565; *Bushby v. Munday*, 5 Mad. 298. If, therefore, all the parties to a mortgage of lands in the colonies be in this country, and the mortgagor file a bill for redemption here, where, from the presence of the parties, it appears the accounts can be most conveniently, and most satisfactorily, taken; should the mortgagee institute a suit in the Colonial Court for foreclosure and sale of the property, he will be restrained from proceedings which must, under such circumstances, at any rate be vexatious and oppressive, if not positively fraudulent. *Beckford v. Kemble*, 1 Sim. & Stu. 15.

5. When English courts are called on to determine rights connected with West Indian mortgages, it seems to be the practice, in conformity with the colonial laws, to direct a sale, instead of a foreclosure, of the mortgaged premises. *Beckford v. Kemble*, *ubi supra*. But though there is this distinction in point of practice, courts of justice here apply to the relation of mortgagor and mortgagee, in cases of West Indian mortgages, all the principles which exist as to that relation here. *Chambers v. Goldwin*, 9 Ves. 271.

6. A mortgagee is *prima facie*, entitled to his costs, when he is involved in any suit having relation to the mortgaged property; but though a mortgagee, who acts fairly, is to have his reasonable expenses allowed, still, by improper and oppressive conduct, he may not only lose his own costs, in whole or in part, (*Detillin v. Gale*, 7 Ves. 586; *Taylor v. Baker*, 5 Price, 311; *Morony v. O'Dea*, 1 Ball & Bea. 121; *Sevier v. Greenway*, 19 Ves. 415,) but may even be compelled to pay those of the other parties, so far as they have been incurred in consequence of his having made an unjust defence to a bill for redemption. *Mocatta v. Murgatroyd*, 1 P. Wms. 395; *England v. Codrington*, 1 Eden, 174. So where a tender of the just mortgage debt, (such tender having been made after due notice,) has been refused; (*Drake v. Hopkins*, 1 Barnard, 320;) the mortgagee may be made to pay the costs of a suit for redemption, which suit, but for his improper refusal, would have been unnecessary. *Shuttleworth v. Lowther*, 7 Ves. 587; *Harvey v. Tebbutt*,

1 Jac. & Walk. 202. And still farther, when, after such tender, there has been an appropriation of the money, for the purpose of being ready to complete the redemption, (*Gyles v. Hall*, 2 P. Wms. 378;) and the mortgagee has notice of that fact; he may not only be mulcted in costs, but may lose all interest from the time of the tender. *Drake v. Hopkins*, *ubi supra*; ——— *v. Trecothick*, 2 Ves. & Bea. 181; *Manning v. Burgess*, 2 Freem. 174. Where a suit respecting a mortgage has been fairly conducted, and upon a sale the fund proves deficient to pay all the incumbrancers, the costs of the suit are to be fully paid in the first instance. *Kenebel v. Scrafton*, 13 Ves. 370; *White v. The Bishop of Peterborough*, Jacob's Rep. 403; *Brace v. The Duchess of Marlborough*, Mosely, 50. A mortgagee who, at first, files his bill merely for an account, but, by subsequent amendments, converts his bill into a bill for foreclosure, must pay the defendant all the costs sustained by him, beyond what he would have been put to if the bill had been originally framed as a bill of foreclosure. *Smith v. Smith*, Coop. 142. And an equitable mortgagee of an estate belonging to one who becomes a bankrupt, must, personally, pay the expenses of a petition for sale of the estate, and also the costs of the assignee's appearance on the petition; for it was the mortgagee's own fault that he took an imperfect security; and he must not, by receiving costs out of the produce of the mortgaged estate, saddle the other creditors of the mortgagor with expenses arising out of his negligence. *Ex parte Horne*, 1 Mad. 624; *Ex parte Warry*, 19 Ves. 473. If, indeed, the assignees raise objections on frivolous or mistaken grounds, they must pay so much of the costs as are occasioned by their ill-advised opposition. *Ex parte Garbutt*, 2 Rose, 78. See 2 Hovenden on Frauds, 186, 191: whence great part of this note is extracted.

MOSELY v. VIRGIN.

[1794, Nov. 14, 25; 1796, JULY 7.]

SPECIFIC performance of an agreement to build may be decreed, if sufficiently certain: but a general covenant to lay out a certain sum in a building of a certain value cannot be so executed. (a.)

Though a formal mistake in a deed may be rectified by articles, of which it purports to be an execution, essential additions cannot be made to a conveyance from articles, of which it does not purport to be an execution: nor can the transaction be rescinded by the Court, [p. 184.]

By articles dated the 4th of October, 1788, it was agreed, that the Plaintiffs should convey six acres and a half of land in fee to Rayner and Taylor, or such persons as they should appoint; and that a rent of one penny a yard square should be created and reserved to the Plaintiffs with powers of entry and distress; with

(a) The decision in the present case, though questioned at the bar, has never been overruled; and indeed, it has incidentally received some confirmation from the reluctance of Courts of Equity to shake it. *Flint v. Brandon*, 8 Vesey, 159; 2 Story, Eq. Jur. § 727. One of the earliest cases of the exercise of jurisdiction in enforcing specific performance was in the Year Book of 8th Edward IV. 4 (b), where it was held that a promise to build a house would be enforced; and this jurisdiction was maintained by the early authorities. *Ibid* 716 note, 725. But it has been expressly denied in later cases, on the ground that, if one will not build, another may, and that there can be a full compensation at law in damages. *Ibid* § 726. And it seems to be completely settled that there is no jurisdiction to compel repairs. *Ibid*, § 727. *Raymer v. Stone*, 2 Eden, 128; and the Reporter's notes, *ib.* 130; *Hill v. Barclay*, 16 Vesey, 405. See also *Brichet v. Bolling*, 5 Munf. 442.

covenants under penalties to lay out 1000*l.* in building, to be worth double the rent reserved, and to take no brick or clay, till that sum should be laid out. By deed of feoffment, dated the 25th of March, 1789, the Plaintiffs conveyed the land to Rayner and Taylor in fee, to hold in moieties, and to pay to each of the Plaintiffs a rent of 35*l.* with powers of distress and entry, and a covenant to lay out 1000*l.* in building; the building to be erected to be of the value of 500*l.* a year, and to be erected within three years. In July, 1789, Rayner and Taylor conveyed three fourths of the land so acquired to Norman and one fourth to Virgin. Norman soon afterwards conveyed all his interest to other persons. Virgin erected buildings upon his fourth: but upon the other three fourths no buildings were erected, that could be productive of any profit. Rayner and all the persons, who had taken interests under him and Taylor, became bankrupts, except Virgin and Norman. The bill prayed either a specific performance, or that the whole transaction might be rescinded.

[* 185] *For the Plaintiffs, *Allen v. Harding*, 2 Eq. Ab. 17, and *City of London v. Nash*, 1 Ves. 12, 3 Atk. 512, were cited; and for the Defendants, Lord Thurlow's opinion against decreeing specific performance of a covenant to build in *Lucas v. Comerford*, 3 Bro. C. C. 166, *ante*, Vol. I. 235.

In the Sittings after Trinity Term, 1795, the Lord Chancellor said, the parties had got into such a situation, that the best course would be to compel them to come to a new agreement by letting it stand, till they should apply for a decree. No accommodation however took place.

LORD CHANCELLOR [LOUGHBOROUGH]. This cause has stood so long for judgment in the hope, that the parties might come to a new agreement. I cannot make out, that the rent of 35*l.* a year in the deed is the exact amount of the penny a yard in the articles. It is much more according to the Statute acre: but they may have gone upon some other acre; and therefore my calculation might be mistaken. It is evident upon the state of the case, that no person is bound *ex contractu* to the Plaintiffs, except Rayner and Taylor: the other parties not having entered into the contract can only be bound in respect of the estate, they hold, and to the extent of that estate. The first question is, whether a specific performance can be decreed. To give that question fair consideration, I will suppose, no deed was executed, and that it rested entirely upon the articles. Take it, that the Plaintiffs had filed the bill to give legal effect to the articles. I have considered in every view of the case, how it is possible upon any principle in that case to exercise that jurisdiction, the Court does exercise in decreeing specific performance. It is commonly said, no such degree can be made upon a covenant to repair; and Lord Thurlow appears to have added, that he did not see, how it could be made upon a covenant to build being equally uncertain. That certainly admits this qualification: if the transaction and agreement is in its nature defined, perhaps there would not be much

difficulty to decree specific performance (1) : but if it is loose and undefined, and it is not expressed distinctly what the building is, so that the Court could describe it as a subject for the report of the Master, the jurisdiction could not apply. In the case cited from 2 Equity Cases abridged, which is a very loose note, and I do not know where to look for a better account of it, there is an idea of a decree for specific performance of an agreement to build.

It is very inaccurate ; * as most of the cases in that book [* 186] are. One cannot well make out what the case was : but I can conceive such a case, as it seems to hint at. It was an agreement to build a parsonage house for the improvement of a living. It is not to be too large nor too small ; and I can conceive such a decree as the Court made there by reference to two clergymen to define, what is a proper parsonage house. But to lay out 1000*l.* in building ! What building ? It is not said. I suppose, a house was meant. It is not said, whether a manufactory would have answered, or not. I cannot tell. But it is not simply that : it goes farther. It is a pure object of speculation to make a commencement of building upon a given spot of ground. Their meaning probably was to erect one house upon expectation, that builders would take the rest, and a speculation, that such a rent might arise as would leave a profit to the builders. We see before our eyes every day, that these speculations are perfectly loose, hazardous, and uncertain. The great object therefore being to convert this ground into streets and houses, the parties having the general object in view must have trusted to each other and to the hazard and chance of the market and the times, whether it would succeed, or not. If I was to decree, that the building should be such as should produce 500*l.* a year, it would be the most absurd decree, that ever was made. Therefore if the original owners of the land had filed such a bill, I should have been obliged to have dismissed it ; and equally, if Rayner and Taylor had been Plaintiffs ; for to have entertained the bill upon their part, they must have introduced themselves by being more specific than the terms of the agreement, of which they demanded execution. Then I should have been called upon to execute, not the agreement, the parties made, but all the supplemental circumstances, which reflection had suggested to one of them, upon which the other came to no agreement. Therefore upon that case I must have left them to what they could do at law.

But it does not rest upon the articles ; for the other prayer of the bill to rescind the transaction, supposes that it rests only as a transaction by agreement between them : but I am called upon to alter the conveyance of the estate ; to compel Rayner and Taylor, supposing them parties, to re-*enfeoff* the feoffor ; or to do what is just

(1) *Craven v. Tickell*, *ante*, vol. i. 60. Specific performance of a covenant to make good a gravel-pit refused : *post*, *Flint v. Brandon*, vol. viii. 159. So no order to repair specifically : *Lane v. Newdilate*, x. 192.

as difficult, perhaps more so, to add to the deed conveying the land terms and conditions essential, and not expressed in that, which is the actual conveyance of the land. If it was only a mistake of form in a deed purporting to be an execution of the articles, [* 187]. which this deed does not *purport to be, the Court might rectify that: but to add, that upon a breach of the covenants they shall be at liberty to re-enter; that would be a very violent measure. But it does not rest here; for *Rayner* and *Taylor* are not before me. As far as the law binds those persons to any agreement of theirs, they shall be bound at law. *Virgin* is in a particular case. There is one hardship, I cannot relieve him from: how can I prevent the whole of this rent being raised upon that fourth? If the good sense of the parties had pointed out to them, that they had entered into a speculation, which has entangled them extremely, the substantial justice, if I could come at it, is, that but one fourth should fall upon him. He has done a great deal towards performing; therefore I put his as a meritorious case. But as to all the others as well as him I must leave them with that sort of estate, they have got. I cannot rescind or reconvey. I cannot mend the situation of the parties; for it is exactly that case, in which any sensible and fair man would say, they have entangled themselves, and it is right they should come to a new agreement upon it: but I cannot decree a new agreement. The agreement is very inconvenient to them all in consequence of their rash and ill-judged conduct; and there is no remedy except by their coming to a new agreement. I cannot make an agreement for them. The consequence is, the bill must be dismissed: but it is a hard case; therefore let it be without costs.

1. As to having a building carried on under the direction of the Court of Chancery, see, *ante*, note 2 to *Lucas v. Comerford*, 1 V. 235.

2. A Court of Equity ought, no doubt, to expound deeds according to the intention of the maker; but it never has been said that a court is so to frame and alter a deed as may best effectuate the maker's intention. The party is left to execute his own purpose, in his own way. If the dispositions which he makes are clear and unambiguous, the Court cannot alter them, merely because they are ineffectual to the attainment of the proposed end. *Cholmondeley v. Clinton*, 2 Meriv. 343. If parties to deeds have neglected so to frame them as to provide the means of arranging their claims, (and no fraud upon either party be shown,) the Court of Chancery will not interpose, upon its own notion of what stipulation would have been proper. *Waters v. Taylor*, 15 Ves. 26; *Serjeant Maynard's case*, 2 Freem. 2. And where a clause is so loosely worded, that the construction which a Court of Law must put on it would leave it inoperative, a Court of Equity is not bound to find an equitable effect for such clause. *Gladstone v. Birley*, 2 Meriv. 404. A party may have neglected to provide a legal remedy; but it does not therefore follow, that he must have an equitable one, unless he has an equitable right. *Wake v. Conyers*, 1 Eden, 335. For though it holds good, as a general rule, that the Court of Chancery is bound, at the instance of any person, to take care injustice is not done; (*Parkhurst v. Louten*, 2 Swanst. 209;) yet it seems too universal a position to hold, that the Court will act in every case to prevent injustice. *Gardiner v. Edwards*, 5 Ves. 592; *Bateman v. Willoe*, 1 Sch. & Lef. 204. The party complaining should show an equitable title to relief; *Grierson v. Eyre*, 9 Ves. 347; unbarred by lapse of time, or other means. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 153.

3. Mere defect of title can never be a ground for the interference of Equity; whether the circumstances of the case are such as will induce the Court to supply

the defect, is a different question. *M'Leod v. Drummond*, 14 Ves. 360. In cases of fraud, no doubt, Equity will, frequently, give relief, even against the words of the Statute of Frauds, in furtherance of its *intent*: thus, if one agreement, or contract in writing, were proposed and drawn; but another secretly brought in and executed in lieu of the former; in this, and every similar, case of fraud, relief would be given. *Viscountess Mountacute v. Maxwell*, 1 P. Wms. 619; *Irnham v. Child*, 1 Brown, 94. And a deed cannot stand, if the conveying party was not a free agent; though it might be difficult to prove a case of legal duress. *Peel v. —*, 16 Ves. 159; *Lady Strathmore v. Bowes*, 1 Ves. Jun. 22. On the other hand, but upon similar principles, if the execution of a deed be prevented, either by force or artifice, Equity will consider such deed as actually executed. *Middleton v. Middleton*, 1 Jac. & Walk. 96. And this in favor of a volunteer, or even in some cases, as against innocent parties. *Mestaer v. Gillespie*, 11 Ves. 639. For it would be almost impossible even to reach a case of fraud, if third persons were allowed to retain *gratuitous* benefits, which have been derived from others, who only acquired the means of granting such advantages through fraud, imposition, or undue influence. *Huguenin v. Basely*, 14 Ves. 289; *Stihwell v. Wilkins*, Jacob's Rep. 282. But it would be pushing this principle too far to extend it to innocent purchasers. *Lloyd v. Passingham*, Coop. 155. It is only where an estate has been obtained by a third person without payment, or with notice of fraud practised by the party under whom he claims, that a Court of Equity will take it from him, to restore it to the party who has been defrauded of it. *Mackrath v. Simmons*, 15 Ves. 340. A *bona fide* purchaser, without notice, having an equal equity, will not be deprived of the advantage which his legal title gives him. *Jerrard v. Saunders*, 2 Ves. Jun. 457.

BRADBURY v. HUNTER.

[1796, JULY 7.]

TRUSTEES having laid out the fund upon a bad security, obtained from the debtor under circumstances unfavorable and to the prejudice of other creditors, a charge on his estate under a power: their bill to enforce the charge against the son, tenant in tail under the marriage settlement, was dismissed with costs.

UPON the marriage of Richard and Mary Shepherd a sum of money, something less than 2100*l.*, part of her fortune, was vested in the orphan stock upon trust for the wife for life, then for the husband for life, then for the children. Charles Orby Hunter having a large estate, subject to several securities and mortgages, and having granted annuities, upon his marriage in 1774 had agreed, that his estate subject to those charges should be settled upon himself for her life; and then to secure a jointure to his intended wife; with remainders to the issue of the marriage. The fortune of the wife, 8000*l.*, was paid to Mr. Hunter on the marriage; and he covenanted within a year to apply that sum, or so much as might be necessary, in discharge of the annuities, he had *granted- [*188] ed. The settlement also gave him a power to raise 4000*l.* the interest of which he covenanted to keep down during his life. A term of 500 years was vested in trustees to secure the jointure and portions for younger children. In 1777 Bradbury and Shepherd, the trustees in the marriage settlement of Richard and Mary

Shepherd, sold out the orphan stock. The produce did not amount to exactly 2100*l.* but Shepherd made it up that sum; and with that sum they purchased from Raymond, an annuity creditor of Hunter, his annuity of 300*l.* with the bond and judgment; for which he had originally paid 1800*l.* Hunter was no party to the conveyance of that annuity. Hunter never paid any of the annuities, but applied 3000*l.*, part of his wife's fortune, in paying part of the portions of his younger brothers, which affected his estate; and the rest he dissipated. Going on to borrow upon annuity, and his affairs becoming very much embarrassed, he was obliged to go abroad; and outlawries issued against him. Two bills were filed; one by parties entitled under his father, paramount his title; the other by his creditors, praying, that he might be restrained from executing for any particular purpose his power under the settlement to raise 4000*l.* and that he might be decreed to execute it for the creditors. By deed, reciting the purchase of Raymond's annuity by Bradbury and Shepherd, the trustees, that an arrear had incurred, which made the whole amount to 3175*l.*, and that they agreed to convert their annuity into a charge for that sum, Hunter charged to that extent under his power. Bradbury and Shepherd however in fact reserved to themselves the bond and judgment, by which the annuity was secured; and did not release their claim by virtue of the annuity. They were made parties to the bill of the creditors; which was filed in November, 1780. The deed under which they claimed the charge, bore the date of September, 1780: but it was proved and admitted to have been executed in December; and it was executed during Hunter's residence at Paris under outlawries from the distress of his circumstances. Upon going before the Master they were ranked in the course of incumbrancers as the 22d, there being nothing therefore for them to receive as annuity creditors, they produced the deed: but the Master upon all the circumstances refused to allow that claim. Before the cause came to a conclusion Hunter died.

Bradbury and Shepherd filed this bill against his son, tenant in tail, and made *the widow a party. The object of the bill was to have the benefit of the charge; and it stated, that part of Mrs. Shepherd's fortune had been advanced by the trustees to Raymond in consequence of an agreement with Hunter, that it should be lent to him upon the security of his power.

LORD CHANCELLOR [LOUGHBOROUGH.] The decree, I am about to make, turns upon a view of the case, that did not strike me much at the time of the hearing; therefore it shall rest in minutes for some time. The power of charging given to Mr. Hunter was, I take it, to attach upon the term of 500 years. It was in effect a power to charge 4000*l.* that should take place subsequent to his own life estate. The estate was not to be burthened with more than that sum and the interest from his death. What was done in fact does not exactly agree to the idea supposed by the bill, that it was agreed, that this part of Mrs. Shepherd's fortune should be lent upon the security of this power, and should be made available by

the effect of it: for in the statement of the case no traces are to be found in writing of this transaction between Mr. Hunter and the Plaintiffs. It is only in the statement of the bill, that Hunter appears to have had any concern in it: upon the deed it is only a transaction with Raymond. Whether the difference between the original price of that annuity and that paid by the Plaintiffs to Raymond was an advanced price from the increased value of the annuity, or a year's arrear, does not appear by any evidence. I lay out of the case the bill by the parties claiming under the will of Hunter's father and paramount his title. By the death of Hunter that part of the prayer of the bill, that respected his power to charge, whether it was available for the creditors in general, became of no effect. The widow is a party to this bill without the least necessity; for her right to the jointure cannot be affected by the claim of the Plaintiffs. It was contended for the tenant in tail, that his father not having performed his covenant to lay out the 8000*l.* in discharging the annuities, he and those claiming under him were not entitled to claim under the charge. Against that it was contended, that his life estate had in fact paid to the incumbrances affecting the inheritance a sum more than, or equal to, that 8000*l.*; and therefore the covenant was substantially performed. Upon the result of the account it cannot be made out, that the estate of the infant was at all helped by any thing, *the father had done. The prior incum- [* 190] brances were discharged, as they ought to have been, and the life estate contributed no more, than it ought. I cannot take off the costs: for they were greatly augmented by the tenant for life having paid no interest, from the distresses, in which he had involved his affairs, and the vast number of parties, he made necessary. I must even add costs against the estate of the father. But it was argued, that supposing that fact should not turn out, that the estate of the infant had had an advantage to the amount of the 8000*l.* from the life estate of the father, yet parties claiming under that power are not bound to take notice whether that covenant was executed or not; that he might have executed it the day after the marriage, or a year after; and also that it was so indefinite, to lay out the money in clearing incumbrances, not to any particular incumbrances, and so much only as might be necessary, that no inquiry could point out, whether the covenant was performed or not: so any person taking under the power would be safe. I feel very much inclined to go along with that argument, and to think, that if a sum of money had been advanced to Hunter upon the execution of the power, and the trustees had joined and made a good security upon the power to the extent of that sum of 4000*l.* according to the nature of the power, it would be a good execution for the person advancing that money, whether the covenant was performed or not. But I do not think, that is the present case; and in the view I have of it, though I should hold, that for a creditor lending money upon the power and taking the trustees as parties to the transaction this Court would have held the trust well declared, and that it could not

be defeated by any act of Hunter's anterior or subsequent; yet it is clear on the other side, that Hunter himself, after he had broken his covenant could not direct the 4000*l.* to be raised for his own benefit by any voluntary deed; and this Court would not substantiate it for any creditor, who could not state a fair consideration. Then what have these creditors given? I cannot discover a single farthing. If they had, it could only be a sum to Hunter to better a bad security. It is a singular application of trust money. In 1777 they choose to purchase one of the annuities: Hunter was not a party to the deed: the sum is applied to that annuity: they take their chance of recovering it; and it is not till late in the year 1780 that Hunter comes into the transaction at all; and then under the circumstances of a man driven out of the country by distress he executes [* 191] the power: how? Not to *secure a sum of money advanced to him, but the accumulation upon the annuity purchased in 1777 to the amount of 3175*l.* That is so evidently an attempt to patch up a claim to an unjust extent, that it struck me, whether I must not direct an inquiry, how much was really advanced. The Court would never hold it meritorious to secure an accumulation upon an old demand by annuity. That is the manner they have made it out. It is very far indeed from a meritorious transaction, or such as a Court of Equity should execute. Then it could not be without notice to them of his situation. His distress was notorious. But it was two months after a bill filed, which affected directly the question, whether his power was to be executed for the general creditors, or was to be made the subject of traffic for a particular creditor. They are parties to that suit. The Master has stated it very fairly; putting his refusal not merely upon the outlawry of Hunter, but upon all the circumstances together. My conclusion therefore is, not only to dismiss the bill, which I must do, with costs as against Mrs. Hunter, but also with costs as against Mr. Hunter.

This decree was not varied (1).

1. THE scheme of the plaintiff in this suit, seems to have been to patch up a previous bad security, by a subsequent very questionable purchase; but it can be hardly necessary to cite many authorities to show that one suspicious deed cannot set up another. *Roche v. O'Brien*, 1 Ball & Bea. 340.

2. The doubt, which Lord Rosslyn entertained in the principal case, whether a person would have been safe in advancing money, upon the faith of a specific execution of the power here in question, a day after the year had elapsed in which the objects for the attainment of which such power was granted, were by covenant agreed to be executed, is not in any degree overruled by the decision in *George v. Milbanke*, 9 Ves. 196. In that case, there was an absolute, unlimited power of appointment, well executed in favor of a volunteer, and an assignment, *bona fide*, and for valuable consideration, by way of mortgage, from the appointee. As against general creditors, having no specific demand upon the property, the assignee was held to have a valid claim, to the extent of the money advanced by him; and he might, by the payment of a *full* valuable consideration, have acquired an absolute and indefeasible interest in the whole. But, where the transaction is

(1) *Post*, 260.

tainted by any thing like fraud, the payment of money cannot make an appointment cease to be fraudulent, though it may cease to be voluntary. *Daubeny v. Cockburne*, 1 Meriv. 639.

WILSON v. MOUNT.

[ROLLS.—1796, JULY 6, 7.]

DEVISE of all freehold and copyhold lands “(the copyhold part whereof I have surrendered to the use of my will)” subject to debts: some were surrendered; others not; the latter did not pass. (a)

A person entitled under a will and also paramount and against it must elect, (b) [p. 191.]

A *videlicet* shall be rejected, if repugnant: not if it can be reconciled, and made restrictive, [p. 194.]

THOMAS FLETCHER devised several estates and premises specifically, and all other his freehold and copyhold messuages or tenements, lands and hereditaments, whatsoever and wheresoever, “whereof I shall die seised or possessed (the copyhold part whereof I have surrendered to the use of my will)” upon trust to sell the said freehold and copyhold messuages or tenements, lands and hereditaments; and he directed the produce to be considered as part of his personal estate, which he disposed of subject to his debts. He gave 2000*l.* in trust to pay the interest to Richard Morhall for life, and after his decease the principal to his children. He gave 1000*l.* in trust in the same manner for Harry Mount and his children; and if they should die under twenty-one, he gave one moiety of the principal to William Mount, and the * other moiety and 1000*l.* [*192] upon trust for Jane Meyrick and her children, and, in case of the death of her children under twenty-one, to William and Harry Mount equally. He gave 2000*l.* in trust to pay the interest in moieties to Nathaniel and Thomas Mason for their respective lives, and after their deaths to their wives for their lives respectively; and after their deaths respectively to pay the principal in moieties to their children; and in case they should die under twenty-one, according to the appointment of Nathaniel and Thomas Mason respectively. He disposed of the residue; and made the trustees executors. Richard Morhall, William Mount and Nathaniel Mason, were his heirs at law and by the custom.

Upon the bill of creditors the will was established by the decree; and it was referred to the Master to take the accounts and to state, what freehold and copyhold estates the testator was seised of at the date of his will and his death, and which were surrendered to the use of the will. The report stated the freehold estates; and that at the date of the will the testator was seised of the following copyhold

(a) See 2 Maddock ch. 50.

(b) With regard to elections see *ante* note (a) to *Buttrick v. Broadhurst*, 1 V. 171; to *Baugh v. Read*, 1 V. 257, and to *Blake v. Bunbury*, 1 V. 514.

estates: 2 A. 1 R. 0 P. part of the pleasure ground belonging to his house, held of the manor of Lewhall, otherwise Walthamstow: 23 A. 1 R. 21 P. marsh land in Walthamstow marshes, held of the manor of Walthamstow Toney and High Hall: 52 A. 0 R. 34 P. part of an estate in the parishes of Wharton and Stow, held of the manor of Stow in the county of Lincoln. The report stated, that he was seised of all the said estates at his death and of no other; that the first and last-mentioned copyhold estates were surrendered to the use of the will: but the last did not pass by the surrender and will, but descended to the heirs at law of the testator on account of an intail, that had not been barred; that the said copyhold estate held of the manor of Walthamstow Toney and High Hall was not surrendered to the use of the will.

The questions were, whether the copyhold estate, that was not surrendered, passed; and whether the heirs at law must not elect to take either under the will or the intailed copyhold estate. Upon the first point *Gascoigne v. Barker*, 3 Atk. 8. and *Rumbold v. Rumbold*, ante, 65 (1), were cited; and upon the second *Whistler v. Webster*, ante, Vol. II. 367 (2).

[* 193] * MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN].

The question is, whether it is perfectly clear he did mean and intend to devise all the copyhold estates, he might have, whether surrendered, or not; and in fact, whether the clause in the parenthesis is to be rejected as mere surplusage and of no avail; for according to that interpretation I must suppose that mere surplusage and not meant to have any effect. To the Plaintiff it is immaterial, whether it was surrendered or not, if he intended to pass them, whether he had surrendered them, or not. Upon that ground it must be understood to be a mere mistake. I am much inclined to think, that was his intent: but I have looked into *Gascoigne v. Barker*, and all the cases cited in the argument of that case; and the single question, I am to ask myself, is, whether it is perfectly clear beyond possibility of doubt in any reasonable mind, that he could not have meant these words to be restrictive; for if he could possibly so mean, in favor of an heir at law I am not at liberty to indulge in any conjecture. I have looked into the Register's Book (3) as to that case: and the report is perfectly correct. The manner in which it is stated in the Register's Book, pretty nearly agrees with the report in all the material points. It was a very strong case for the Court to indulge itself by including what was not surrendered from the nature of the premises: they were all the same tenement: but a gateway and out-offices were in another manor. Those being part of the same premises and in the same tenure, it is as strong a case, as I can well state. The question was the same as in this case; whether the parenthesis, which appears to me little more than an allegation, was to be taken as restrictive. If he had named the

(1) *Post*, *Hills v. Downton*, vol. v. 557.

(2) *Post*, *Blunt v. Clitherow*, vol. x. 589, and the note, 591.

(3) A. 1739, fol. 317; A. 1743, fol. 145.

premises, and then said "which I have surrendered," &c. a mistake as to that circumstance, provided it was clear what he meant, would not have defeated it. That was a most solemn decision, having been three times before the Court. An injunction had been obtained for want of an answer. In the Register's Book the devise is thus stated from the answer of the customary heir, "All his lands and tenements freehold and copyhold in possession and reversion and elsewhere in the County of Middlesex, and which copyhold lands he had surrendered to the use of his will." These words certainly are not accurate; for there is nothing for "elsewhere" to refer to; and I rather think, those in the Report are more accurate; but it satisfies me, * that they are pretty much the [* 194] same as in the report. It is stated from the same answer, that upon the motion to dissolve the injunction it appeared, that the testator had devised such of his copyhold lands, as he had surrendered to the use of his will; and that the premises holden of the manor of Sutton Court had never been surrendered to the use of his will; and therefore the Court dissolved the injunction. The same question therefore came on upon that motion and at the hearing; and there was a re-hearing. Every argument, that could apply in that case, applies to this. It was not necessary to consider the parenthesis as more than assertion. It seems to me enough to say, it may operate as a restriction. A testator shall not be supposed to pass what he cannot pass. If he had said all his copyhold lands, I must have taken it, that he meant whether surrendered or not: but upon this description it is at least doubtful, whether he meant to pass this. Fortified by this case I cannot say I am satisfied, that he has given any but such as were surrendered. I have looked into the three cases cited before Lord Hardwicke. In that in Hobart there is a great deal of learning upon this very point. That consists not only of the principal case, but, as is usual in that book, of a variety of cases argued upon; and the result of all is, that if a *videlicet* is repugnant to what has gone before, it shall be rejected; but if it can be reconciled and made restrictive, it shall be so: thus where land in the occupation of Thomas Cotton is given; and the testator has none in his hands, but had lands in the hands of Robert Cotton, they shall pass: otherwise the devise would be totally frustrated. I agree to that; which would apply here, if the testator had no copyhold, that was surrendered; upon which, I understand, *Rumbold v. Rumbold* turned entirely. Lord Hardwicke seems to think, the case in March went entirely upon the ground of totally frustrating the devise. Upon the whole, if Lord Hardwicke was right, as I think he was, there is not sufficient to warrant me in saying, it is apparent, the testator meant to pass this copyhold estate. Therefore it descends to the heir.

Upon the second point it was not strenuously argued, that the heir could be entitled to take both under the will and the copyhold estate, that was entailed. It is clear, the testator intended to pass the entailed copyhold; therefore upon the common doctrine,

rule, that where costs are payable out of a fund, there may be a revivor for them. In *Edgill v. Brown* (1), 23d July, 1732, the decree was not enrolled: but Lord King laid aside the idea, that to constitute the demand by the representative of the Plaintiff for the costs taxed enrolment was necessary. The Master had [* 197] *made his report. It was held, that, whether the decree was enrolled, or not, it should have the same effect, as a judgment at law would have; and the revivor was proper. Lord Hardwicke in *White v. Hayward* (2) followed this upon the same ground as Lord King's. There the Defendant was in execution for the costs: the Plaintiff died; and the Defendant applied to be discharged: Lord Hardwicke held, that the right to the costs did not die: but as it was objected for the Defendant, that there might or might not be a revivor, he made an order, that the representative should revive within a certain time; and if she did not, the Defendant should be discharged: but he allowed the revivor. In *Blower v. Morret*, 23d April, 1754 (3), costs decreed out of the estate were held to be a lien upon it, though the party, to whom they were awarded, died; and it was held, that they might be recovered; and it was only necessary to bring the party before the Court.

There are many other determinations by Lord Hardwicke and Sir Thomas Clarke upon the same ground, that where costs are payable out of the estate, they are not lost by the abatement. *Price v. Humphrey* (4), 17th July, 1766, before Lord Camden, is exactly a parallel case to this before me. The bill was to set aside deeds for fraud; which was decreed with costs. The revivor was only for the costs, the Plaintiff being dead. The deeds had been delivered up. A demurrer was put in upon the ground, that the costs were not taxed. Lord Camden over-ruled the demurrer; as the deeds were set aside for fraud; and held, that the costs should be paid. There was a demurrer in this cause, which I over-ruled upon a point, that has nothing to do with this question; it did not appear upon the bill, that the deeds had been delivered up. The answer now puts an end to that by stating, that all the decree has been executed. In a late case before Lord Thurlow the Master had taxed the costs; but the Plaintiff died, before the report was signed. Lord Thurlow ordered the Master to sign his report. Signing the report is the last act in Court, like a judgment at law; but Lord Thurlow held, the representative was entitled to his costs. I mention this more particularly, because there was a case before Lord Bathurst, *Askew v. Townshend* (5), in which the proceedings before the Master had gone a considerable length. The bill was for an injunction to stay proceedings at law. I think, it was upon some leases at Tottenham; Alderman Townshend had taken an advantage under the

(1) 1 Dick. 62.

(2) 2 Ves. 461; 1 Dick. 173.

(3) 3 Atk. 772; 1 Dick. 254.

(4) 1 Dick. 381.

(5) 2 Dick. 471.

leases, after houses were built, to which this Court thought he had no right. A perpetual injunction was granted with costs against the Defendant; and a demurrer was put in to a bill of revivor upon the Plaintiff's death; and the demurrer was allowed upon a recent authority in the Exchequer. This case was cited to Lord Thurlow; who thought it not fit to be followed: and gave the costs by directing the Master to sign his report; which, if it had been done, would have brought it up to the case of a judgment at law.

Upon this course of authorities, setting aside the matter of form, which does not apply to this Court, whether the costs are a duty, or not, I think, it is fairly open. The Court had created that duty. The Court has determined, that the Plaintiff had a good equitable title, as he certainly had a good legal title, to have these deeds set aside. This Court having directed the trial, the party having properly sought his relief here, which I suppose he was obliged to do from not being able to give evidence at law, and prevailing in both cases, it would be very hard, if all the expense of the recovery should be entirely lost. That case before Lord Camden cannot be distinguished from this. If there upon the ground of a duty, which ought to be discharged by the Defendant, the Plaintiff's representatives had by the judgment a vested right to recover the costs, there can be no reason for me not to follow that, and establish it so far at least, that where the Plaintiff dies after a judgment for costs, though not taxed at his death, he may by a decree for revivor have those costs. When the case occurs of an abatement by the death of the Defendant, as to which I determine nothing, it will then be fit to consider, whether the inconvenience of drawing the account of assets in this Court will prevail against the principle, that seems very just and very fit to be followed.

SEE, *ante*, the notes to S. C. 2 V. 313.

BEMPDE v. JOHNSTONE.
GRAHAM v. JOHNSTONE.

[1796, JUNE 12.]

THE personal property of an intestate, wherever situated, must be distributed by the law of the country, where his domicile was; which is *prima facie* the place of his residence: but that may be rebutted and supported by circumstances. (a)

GEORGE, late Marquis of Annandale, died in 1792, intestate, without issue and a lunatic. The question, upon which these causes were

(a) The universal doctrine, now recognized by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death.

instituted, was, whether his personal property, which was very considerable, should be distributed according to the law of [* 199] * England or of Scotland. Sir Richard Johnstone Vanden Bempde and Charles Johnstone, half brothers of the Marquis on the side of his mother, and Lady Christian Graham, only surviving issue of Henrietta, late Countess of Hopetoun, half sister of the Marquis on the side of his father, were his next of kin by the law of England; and Lady Christian Graham alone was entitled by the law of Scotland. The material facts were these. William, Marquis of Annandale, in 1718, his first wife having died in 1716, married the daughter of Vanden Bempde; and by her had two sons George and John. He was one of the sixteen peers elected to represent the peerage of Scotland. After his second marriage he never returned to Scotland; but lived at Whitehall and Ashted in houses which he rented. He died at Bath in 1721. Upon the death of his eldest son James, in 1730, George, his eldest son by the second marriage, succeeded to the title. He was born in 1720 at his father's house in London. He continued there, till he was sent to Eton; where he remained till 1734; except in the vacation; when he visited his mother in London. Leaving Eton he went abroad, and continued abroad in different places till 1738; when he returned to London; whence in a few days he went to Scotland. He continued there a little more than a month; then returned to London; remained there about two months; and then went abroad. He continued abroad in different places till December 1739; when he returned to England; and he remained in London till April, 1740. Then he went to Scotland. The beginning of October he returned to England. In May, 1741, he again went to Scotland: he returned to England about the middle of July; and in January, 1742, he

It is of no consequence, what is the country of the birth of the intestate, or of his former domicil, or what is the actual *situs* of the personal property at the time of his death; it devolves upon those, who are entitled to take it, as heirs or distributees, according to the law of his actual domicil at the time of his death. Story, Conflict of Laws, § 481, where the various authorities, both in the common law, and other systems of jurisprudence, are carefully collected and analysed. *Harvey v. Richards*, 1 Mason, 418; *Holmes v. Remsen*, 4 Johns. Ch. 460; *S. C.* 20 Johns. 229; *DeCouche v. Savatier*, 3 Johns. Ch. 190; *Shultz v. Pulver*, 3 Paige, 182; *DeSobry v. DeLaistrie*, 2 Harr. & Johns. 193.

As to what constitutes the domicil, see Story, Conflict of Laws, § 46, 47, 48. The place where a married man's family resides is generally to be deemed his domicil. But the presumption may be controlled by other circumstances; for if it is a place of temporary establishment only for his family, or for transient objects, it will not be deemed his domicil. *Ibid*; Pothier, Coutumes d'Orleans, ch. 1, art. 15; *Harvard College v. Gore*, 5 Pick. 370. Foreigners who reside in a country for permanent or indefinite purposes, *animo manendi*, are treated universally as inhabitants of that country. Vattel, Lib. 1, ch. 19, § 213. But a national character, acquired in a foreign country by residence, changes, when the party has left the country *animo non revertendi*, and is on his return to the country, where he had his antecedent domicil. And especially if he be *in itinere* to his native country with that intent, his native domicil revives, while he is yet *in transitu*; for the native domicil easily reverts. Story, Confli. § 48; *The Venus*, 8 Cranch, 278; *The Frances*, 1b. 335; *The Indian Chief*, 3 Rob. 12; *The Friendship*, 3 Wheaton, 14.

went abroad. In November he returned to England: and remained there till December, 1743; except that he was in Paris a fortnight or three weeks in that year. In December, 1743, he went abroad. In the middle of April, 1744, he returned to England; and remained there till his death. In 1747 a commission of lunacy issued against him; and he was found a lunatic from December 1744. By the will of his maternal grandfather Vanden Bempde a very narrow allowance was given to the Marquis and his brother, till they should attain the age of twenty-three; and, after either had attained that age, the trustees were directed to settle the estates upon such of them, as they should think fit, and his heirs male; and in default of appointment they were devised to Marquis George and his issue male in strict settlement, with several remainders over. The *trustees making no appointment, the Mar- [* 200] quis became entitled under that will to the estates devised, including Hackness Hall in Yorkshire and a house in Pall Mall. He did not become possessed of property in Scotland till 1733 or 1734, after a long litigation with the Hopetoun family upon the effect of a settlement by Marquis James. The journey of Marquis George to Scotland in 1741 was for the purpose of procuring his brother to be elected member of parliament for the boroughs near his estate: upon the two other occasions he went on visits to his mother and others. He lived in lodgings and ready furnished houses on account of his narrow income.

A great deal of evidence from the Marquis's letters was produced to show his preference of the one country to the other. The arguments, which took up the greater part of Hilary Term, went very much at large into the learning of the civil law as to the domicile of the Marquis and his father. *Bruce v. Bruce*, *Lashley v. Hogg*, and *Balfour v. Scott* (1), all before the House of Lords, were cited.

Lord CHANCELLOR [LOUGHBOROUGH]. The great value of the property and the consideration of the parties produced in this case a large field of argument; and I am much obliged to the Bar for their great ingenuity, and the great research, they made. I do not recollect ever to have heard with more satisfaction an argument carried on upon any point. I do not go into the detail of it; not from any disrespect to it, or any idea, that the points do not deserve to be stated, and to receive such answer as might occur to me to give them: but all questions of succession are in their nature questions of positive law; and if the argument had raised a doubt in my mind, and I were not inclined to follow the rule, that has prevailed in other cases, I am bound by repeated decisions in the House of Lords to make the decree, I intend to make; that the Marquis had that domicile in England, that decides upon the succession to his personal property, and carries the distribution according to the law of England. The point has been established in the cases in the House of Lords, which, if it was quite new and open, always appeared to me

(1) Stated in *Somerville v. Lord Somerville*, *post*, vol. v. 750; 6 Bro. P. C. 550, 577; 7 Bro. P. C. 566.

to be susceptible of a great deal of argument : whether in the case of a person dying intestate, having property in different places and subject to different laws, the law of each place should not obtain in the distribution of the property situated there. Many

[* 201] *foreign lawyers have held that proposition. There was a time, when the Courts of Scotland certainly held so.

The judgments in the House of Lords have taken a contrary course ; that there can be but one law : they must fix the place of the domicile ; and the law of that country, where the domicile is, decides, wherever the property is situated. That I take to be the fixed law now. The Court of Session has conformed to those decisions ; according to which the Courts of Great Britain, both of Scotland and England, are bound to act.

The question, what was the domicile, has been with regard to Lord Annandale established upon a very few propositions. Born in this country : educated in this country : this country was the seat of his expectations for the greater part of his life ; reckoning his life to terminate at the period of his lunacy. During the greater part of that period he had no expectations of fortune, settlement, or establishment, any where but in this country, according to the disposition his maternal grand-father made in his favor. The habit of his education carried him abroad at an early period. Returned, he never had a residence in Scotland. He never was there at any period with a fixed purpose of remaining. His existence there was purely a purpose of either visit or business ; and both circumscribed and defined in their time. Wherever he had a place of residence, that could not be referred to an occasional and temporary purpose, that is found in England, and no where else. I am not clear, that the period of his lunacy is totally to be discarded. But I will take him to have died then. For the greater part of the period previous to that he was fixed in this country ; and fixed by all those ties, that describe a settled residence, and distinguish it from that, which is temporary and occasional.

The argument then rests upon the domicile of his father. In the first place, that question, what was the domicile of his father, is of itself a question, I am not called upon to decide ; and I am by no means prepared to adopt the proposition, that his father should be considered as having had a domicile in Scotland. In the latter part of his life his domicile *de facto* was unquestionably in England. During the latter part of it, and from an epoch remarkable enough, when contracting a second marriage, and forming a new family, all the circumstances of his family at that period point much more to England than to Scotland. The question of domicile *prima facie* is much more a question of fact than of law. The actual place, where

he is, is *prima facie* to a great many given purposes his [* 202] domicile. You *encounter that, if you show, it is either constrained, or from the necessity of his affairs, or transitory ; that he is a sojourner ; and you take from it all character of permanency. If on the contrary you show, that the place of his

residence is the seat of his fortune ; if the place of his birth, upon which I lay the least stress ; but if the place of his education, where he acquired all his early habits, friends and connexions, and all the links, that attach him to society, are found there ; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question ; which would be, where does he reside ? In London. Is that his domicile ? It is ; unless you show, that is not the place, where he would be, if there was no particular circumstance to determine his position in some other place at that period. In this case every thing leads one to conclude, that the place, where Lord Annandale is found, is the place, where he would be, no occasion taking him to any other place. When that is fixed, and you have found all the circumstances, that give a character of permanency to that place, where he really is, it is in vain to inquire, where was his father's domicile.

The case, last determined in the House of Lords, is the case of Sir Charles Douglas (1). I particularly had the benefit of hearing all the arguments so well pressed in this cause and also at the Bar of the House in that. It fell to my share to pronounce the judgment : but it was much more formed by Lord Thurlow and settled in concert with him : the general course of the reasoning he approved. It was one of the strongest cases ; for there was first a determination of the Court of Session upon the point. Great respect was due to that. They had determined the point. The judgment was reversed. It came before the House with all the respect due to the Court of Session upon the very point, and under circumstances, that affected the feelings of every one ; for the consequences of the judgment, the House of Lords found themselves obliged to give, were harsh and cruel. If the particular circumstances, raising very just sentiments in every mind, could prevail against the uniformity of rule, it is so much the duty of Courts of Justice to establish, there could be no case, in which the feelings would have led one farther. Lord Annandale's case is not near so strong. The habits of Sir Charles Douglas were military. He had no settled property. His life had been passed in very different parts of the world. If the consideration of his original domicile could have had the weight, that is attempted in this case, it would have had much more there ; for there was less * of positive fixed residence [* 203] there than in this case. At one time he was in Russia ; at another in Holland ; and in a fixed situation as commander of a ship in the Russian and Dutch service. His activity rendered him not much settled any where. It was necessary to take him where he was found. The cause had this additional circumstance, that he happened to die in Scotland, the place of his birth : but undoubtedly he went there for a very temporary purpose ; a mere visit to his family, when going to take a command upon the American ser-

(1) *Onnaney v. Bingham*, stated in *Somerville v. Lord Somerville*, post, vol. v. 750.

vice. That is so strong a case, that it makes it rather improper in me to have said so much. Dismiss the bill of Lady Graham; tax all the parties their costs; and let the distribution be according to the prayer of the other bill (1).

1. THE succession to the personal property of intestates is to be regulated by the law of that country of which they were domiciled inhabitants at the time of their decease; the *lex loci rei sitæ* only prevails when an intestate had no domicil. *Somerville v. Lord Somerville*, 5 Ves. 786, 791; *Pipon v. Pipon*, Ambl. 27; *S. C.* Ridg. 172; *Burn v. Cole*, Ambl. 416; *Curling v. Thornton*, 2 Addams, 15. When the question of domicil is brought before our English courts, (which is but rarely,) the writings of foreign jurists are commonly resorted to, as affording principles of decision. *Pottinger v. Wighman*, 3 Meriv. 79. The cases in our own courts have, principally, arisen with respect to natives of Scotland. *Brodie v. Barry*, 2 Ves. & Bea. 131. And the contests on this subject have originated in the different effect of the law of England and that of Scotland, as to the distribution of an intestate's personalty; the primary applicability of such property, according to English law, being to the payment of an intestate's debts of every description; whilst, according to the Scotch law, the real estate of an intestate debtor is the primary fund for the payment of any heritable bonds granted by him. *Balfour v. Scott*, and *Drummond v. Drummond*, stated in 2 Ves. & Bea. 131. And see *Marsh v. Hutchinson*, 2 Bos. & Pull. 230.

2. When it was intimated, above, that the succession to an intestate's personalty must depend on the laws of the country in which he was domiciled at his death; this is not to be understood, (in an unqualified sense, at all events,) as applicable to British subjects, except where the domicil of such parties at the time of their death was in some part of the British dominions, or the dependencies thereof; there would be great difficulty in maintaining, that a British subject might shift his *forum originis*, for a foreign domicil: it may be doubted, whether a British-born subject can be allowed so far *exuere patriam* as to select a foreign domicil in complete derogation of his British; and nothing but such complete renunciation of his country can render any property left by him in this country liable to distribution according to any foreign law. *Curling v. Thornton*, 2 Addams, 17, 19. [But the doctrine has been since fully established, that the law of the actual foreign domicil of a British subject is exclusively to govern in relation to his testament of personal property, as it would in the case of a mere foreigner. *Stanley v. Barnes*, 3 Hagg. Eccles. 373-465; *Moore v. Davell*, 4 ib. 346, 354. The same doctrine is now as firmly established in the United States. *Desobats v. Berquiers*, 1 Binney, 336; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Harvey v. Richards*, 1 Mason, 381, and cases cited, p. 408, note; Story, Conflict of Laws, § 467, 468.] And although where the question relates to two domicils, either of which, as being both British, the deceased was free to elect, there the original domicil may be held to be shifted; yet this cannot be done, even in such a case, until the party has not only acquired another domicil, but has manifested, and carried into execution, an intention of abandoning his former domicil, and taking another as his sole domicil. *Somerville v. Lord Somerville*, 5 Ves. 787. A new domicil, however, when once established, is not lost by mere abandonment. *Munroe v. Douglas*, 5 Mad. 405; *Bruce v. Bruce*, 2 Bos. & Pull. 231, in note.

3. From Mr. Forrester's ms. it appears that, in the case of *Lady How v. Count Kilmanseg*, decided in E. T. 25 Geo. II. (A. D. 1752,) upon a question arising as to a codicil of the Countess of Darlington's will, made at Hanover, whereby she disposed of 5,000*l.*, South Sea annuities; it was laid down as a general distinction by Lord Hardwicke, that if a foreigner, living abroad and having a personal estate in England, makes a universal heir or residuary legatee, giving either the whole or the residue of such estate to be settled according to a foreign law, the Court of Chancery here will not prevent the executor from getting the estate which may be

(1) *Thorpe v. Watkins*, 2 Ves. 35. In this case Lord Hardwicke observes, that, if the disposition of the property was to depend upon the locality, it would have the mischievous consequence of deterring foreigners from dealing in the English funds.

in England, in order to transmit it abroad. But if he gives a specific thing, as a leasehold estate, or South Sea annuities, to a particular legatee for life or years, making farther limitations of the estate so bequeathed, which limitations are void by the law of England, though good by the law of the country in which the will is made, the English Court of Chancery will lend no assistance to carry such limitations into effect.

M'KENNY v. EAST INDIA COMPANY.

[1796, JULY 12.]

To entitle the widow of an officer in the East India Company's service to Lord Clive's bounty, the marriage must have taken place, before he retired from the service.

To entitle the widow of an officer in the army to the pension from government, the marriage must have taken place, before he retired from the service, [p. 204.]

By deed, dated in 1770, reciting a legacy given by Meer Mahommed Jaffier Cawn to Lord Clive, and that Lord Clive being zealous for the prosperity of the Company, and considering, that an establishment of a provision for such of the officers and private men in the Company's service, as should be disabled by war, age, or disease contracted during their service, would tend to induce fit persons to enter into the service, and encourage the bravery of the troops, proposed to the Court of Directors to appropriate the interest of the said legacy for the support of a certain number of officers and private men, who from wounds, length of service, or disease contracted during service, are unable or unfit to serve, and whose fortunes are too scanty to afford the officers a decent, and the private men a comfortable, subsistence; and also to make some provision for the widows of such officers and private men as would have been entitled to the said bounty, or whose husbands should have lost their lives in the service; and reciting a gift of a farther sum by the present Nabob, it was agreed, that the Court of Directors should be perpetual trustees to dispose of the interest of the said fund, to and among, and for the relief and maintenance of European officers and soldiers, *who shall become invalids or su- [*204] perannuated in the said United Company's service, and of their widows, and also the widows of such officers and soldiers, as shall die in the said United Company's service, in the shares, dividends, and proportions following, &c.

Colonel M'Kenny entered the Company's service in 1760. In 1789 he retired from the service, being held a proper object of Lord Clive's bounty by wounds and disease: and he received an annual pension of 228*l.* under the trust. He married in 1790; and died in 1791. The bill was filed by his widow, claiming the benefit of the trust. The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN] sitting for the Lord Chancellor, had dismissed the bill. It came on for a rehearing.

LORD CHANCELLOR [LOUGHBOROUGH]. It would be extremely in-

convenient, if the claims on this Fund should be productive of suits in Equity; but I am of opinion upon the view of this deed, it would be a gross breach of trust, and prejudicial to the objects of the charity, if the Company were to pay this pension to the Plaintiff. It is exactly in analogy to the provision made by Government for the widows of officers of the army. It would be perfectly against the original purpose of that charity, that the widow's pension should be paid to a widow married after retiring from the service. Whatever argument may be made upon the recital, I think, the deed is very cautiously and properly expressed. The marriage must have been contracted in the time of the service. It would be a deviation from all the purposes of the trust for him, after retiring from the service, to marry in order to make a pension to the injury of the proper objects of charity.

THE widow of the late General Donkin, it is believed, was held, very recently, not entitled to a pension, her marriage not having taken place till a short time before the general's death, who was of a very advanced age, and had not been employed for a great number of years.

PERRY v. WOODS.

[ROLLS.—1795, Nov. 25, 30; 1796, JULY 12.]

LEGACY to A. for life, and after her decease to her children; if she should leave none, to B. and C. share and share alike, or to the survivor: a vested interest in B. and C. upon the death of the testator as tenants in common; A. though she survived them, dying without children. (a)

JEREMIAH GARDINER by his will gave to six persons all his 3 and a half per cent. Bank annuities 1758, and all his 4 per cent. Bank annuities, equally, share and share alike; and in case either of them should die before him he directed that share to be transferred to the child or children of the deceased, and if there should be no child, to be divided equally among the survivors, share and share alike. He gave 1500*l.* capital Old South-sea annuities upon trust to pay the interest and dividends to Anne Pricklow for life; and after her decease to her son Joseph Pricklow for life; and after his decease to transfer the principal to William Pricklow, John Pricklow and Anne Darby, in equal shares and proportions, and to the survivor or survivors of them, who shall be living at their decease. He gave 1500*l.* 3 per cent. Bank annuities to * Elizabeth Os- [* 205]

(a) Contingent and executory interests, though they do not vest in possession, may vest in right so as to be transmissible to executors or administrators. But where the contingency, upon which the interest depends, is the endurance of the life of the party entitled to it, till a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to his executors or administrators. 1 Williams, Executors, 638. See, also, *Drayton v. Drayton*, 1 Dessaus. 324; *Campbell v. Heron*, Cam. & Worw. 298.

born for life; and after her decease to William and John Pricklow and Anne Darby in the same manner, and to the survivor and survivors of them, who shall be living at her decease. He gave 150*l.* capital Old South Sea annuities upon trust to pay the interest and dividends to Anne Darby for life; and after her decease to and among her child and children; to be applied towards their maintenance and education; and the principal to be paid to them at the age of twenty-one respectively: but in case Anne Darby should die and leave no child or children, he directed his executors to pay the principal unto his cousins William and John Pricklow share and share alike, or to the survivor of them. He gave 60*l.* Bank Long Annuities in trust for the maintenance and education of three persons, and when they should respectively attain the age of twenty-four, or sooner, if his executors should think fit, but not otherwise, he directed them to transfer to each that proportion of the said annuities, or to the survivor of them. He gave the residue to Joseph Coltman.

The testator died in 1775. William Pricklow died in 1778. John Pricklow died in 1793; and Anne Darby died without issue in 1794. The bill was filed by the executors of John Pricklow claiming in the event of the death of Anne Darby without issue the latter sum of 1500*l.* South Sea Annuities, either exclusively, John Pricklow having survived William, or with Aaron Darby, administrator of William Pricklow, in moieties. The executor of the residuary legatee claimed the said 1500*l.* stock as having fallen into the residue.

Mr. *Graham* and Mr. *Steele*, for the Plaintiffs. "Survivor" must mean survivor of the two Pricklows; for wherever that word has in this will reference to any particular period, it is clearly expressed. *Oakley v. Young*, 2 Eq. Ab. 537. *Lord Bindon v. Lord Suffolk*, 1 P. Wms. 96. 1 Bro. P. C. 189. It cannot be supposed, he intended, to give it to them only in the event of their surviving Anne Darby. *Barnes v. Allen*, 1 Bro. C. C. 181.

Mr. *Lloyd* and Mr. *Cox*, for the administrator of William Pricklow. The uniform construction is in favor of vesting, unless it appears clearly, there is to be some contingency. The meaning put upon the words of survivorship is to prevent a lapse. *Stringer v. Philips*, 1 Eq. Ab. 292. 1 P. Wms. 97, n. *Haws v. Haws*, * *Stones v. Heurtley*, 1 Ves. 13, 165. *Rose v. Hill*, [*206] 3 Burr. 1881. *Wilson v. Bayly*, 5 Bro. P. C. 388. In *Hamilton v. Sneyd*, Exch. 9th June, 1787, the testatrix gave 2000*l.* upon trust to pay the interest to her grand-daughter for life or till her marriage; and if she should marry, to pay the principal to her husband; seeing a proper settlement made; and if she should depart this life, not having been married, the testatrix then appointed the said sum of 2000*l.* to be paid to and equally divided between her two grand-sons Edward and William. The Court of Exchequer upon the authority of *Monkhouse v. Holme*, 1 Bro. C. C. 298, thought it vested at the death of the testatrix; and as they were

tenants in common, though one died in the life of the tenant for life, his representative was entitled. *Roebuck v. Dean*, 4 Bro. C. C. 403. *Ante*, Vol. II. 265.

Mr. Piggott and Mr. Stanley, for the executor of the residuary legatee. The technical rule and the cases do not apply: the intention being, that neither should take, unless surviving Anne Darby. *Brograve v. Winder*, *ante*, Vol. II. 634. There the Lord Chancellor explains the ground upon which *Lord Bindon v. Lord Suffolk* was decided. *Norris v. Huthwaite*, 1 Bro. C. C. 182, n. (1).

July 12th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN.] The question is simply with regard to the interest, the two Pricklows took by this bequest; whether as tenants in common, or a joint interest, that survived upon the death of one in the life of Anne Darby: the residuary legatee contends, that it was only contingent. It is perfectly clear, that where there are words such as these, "share and share alike," which unquestionably create a tenancy in common, the principle, upon which the Court has always proceeded, is to give the legal, common, known, effect to those words, unless controlled by circumstances clearly denoting, that they are not used in that sense, which is their natural import. The question therefore is only, whether the subsequent words, "or to the survivor," show a manifest intention not to use the former words in their natural sense. The very long argument and the numerous cases cited are enough to show, that it is not clear what he meant by the word "survivor;" and if it is doubtful, whether the latter expression intended to prevent a tenancy in common, they must upon the principle,

[*207] I have stated, be tenants in common. Then *it remains only to give such a sense to the latter words, that, if possible, they may not be entirely rejected, and yet may not be inconsistent with what precedes. *Stringer v. Philips* is literally in point. That case is supposed to have been in contradiction to the case in the House of Lords; which the reporter thinks it does impeach: but I am very willing to be governed by it in this case; in which the words are the same; and though it may be supposed to differ in some degree from the case in the House of Lords, it is enough to say, it was determined not a great while after that decision, and has been recognized in subsequent cases as not contradicting the decision of the House of Lords so far as to be destitute of authority. The same question upon very nearly the same words arose in *Roebuck v. Dean*. In that case the Lord Chancellor had occasion to consider both those cases; and he there intimates, what I do not wonder at, his doubt of the ground, upon which Lord Cowper's decree was reversed. He says, he cannot conceive upon what ground. Neither can I. In that case, which is as near the present, as can well be imagined, he was of opinion, that the survivorship, as in *Stringer v. Philips*, was inserted for no other purpose than to prevent a lapse, in case any of the parties should die before the testator; an event,

(1) See 1 Bro. C. C. 300.

that happened in the case before him ; and that no other interpretation would give effect to every part of the will. *Brograve v. Winder* is insisted on as defeating that case. It is enough to say, that in the determination of *Brograve v. Winder* the Lord Chancellor by no means seems to depart from *Roebuck v. Dean*, and his opinion as to *Stringer v. Philips* ; for he expressly states and comments upon it, and gives his reasons for thinking, there was sufficient upon the will then before him to show, the testator did not mean any thing to vest till the time of sale, from which the fund was to arise. There he still recognizes *Stringer v. Philips*, and seems to retain the same opinion of *Lord Bindon v. Lord Suffolk*. To show, that *Stringer v. Philips* has by no means been doubted, a very strong case was cited from 3 Burrow, with regard to the opinion of a Court of Law ; where Lord Mansfield lays down the principle, upon which I decide this cause ; that the testator has declared, they are not to take as joint-tenants. What is there said amounts to this : as it is clear, they are to take as tenants in common, and as survivorship is mentioned in the will, rather than utterly to reject those words, what Sir Joseph Jekyll did shall be adopted as the best construction. In *Haws v. Haws*, Lord Hardwicke * expressly [*208] says, if no other reasonable construction can be found, that shall be adopted. In *Stones v. Heurtley* he appears to have adhered to *Stringer v. Philips* and to have decreed accordingly. It remains only to see, whether there can be a different construction upon words exactly the same as in *Stringer v. Philips*, without a single circumstance, except that in some particular cases the testator has declared his intention as to the time of division. I am of opinion, I am not at liberty to deviate from that authority. The words are perfectly clear to make them tenants in common. That is the only reasonable construction. *Barnes v. Allen* is often quoted as analogous to the present case ; but it is not the least like it, as the words really are by the Register's Book (1). Lord Thurlow did not mean

(1) " And in case my said wife shall happen to live, until such child or children shall attain his or their respective ages, as aforesaid, then my mind and will is, that my said trustees or the survivor of them or his executors and administrators after payment to themselves of their reasonable costs and charges in the execution of the trust in this my will, do and shall transfer all such securities unto my said wife and such child or children who shall live to attain their said ages, or the survivors or survivor of them, equally among them share and share alike ; but if it shall happen, that my said wife shall depart this life leaving no such child or children living at the time of her decease, then my mind and will is, that my said trustees or the survivor of them, his executors or administrators, do and shall transfer all such securities, in which the residue of my said personal estate shall be invested, unto my said loving brothers John and Henry Allen ; and in case any or either of them shall be then dead, then to the survivor of them for his own use and benefit ; and I do hereby give the same to them accordingly." His Lordship doth declare, that the same, subject to the life interest of the defendant Cath. Allen therein, in case she should so long continue unmarried, was vested in John Allen and Henry Allen (who survived the said testator ; but are since dead) as joint-tenants ; and the said Henry Allen having survived the said John Allen, his Lordship doth also declare, that the said residue, subject to such interest, as aforesaid, of the defendant Cath. Allen, belongs to the Plaintiff Aubrey Barnes, the

to give any opinion upon any case bearing the least similarity to this. Upon the whole therefore I am of opinion, the construction that will give effect to every word of this will, that is not inconsistent with preceding cases, and is perfectly analogous and indeed in point to *Stringer v. Philips*, and *Roebuck v. Dean*, is, that this interest vested in William and John Pricklow as tenants in common, and upon the death of Ann Darby became divisible in moieties between their representatives. All parties must have their costs out of the fund (1).

1. THAT a future interest, given by will, may vest, notwithstanding such interest is liable to be divested; see *ante*, note 3 to *Malim v. Keighley*, 2 V. 333.

2. With respect to the general rule, as to the period to which survivorship between legatees is to be referred, when no special intention is discoverable; see note 3 to *Hill v. Chapman*, 1 V. 405: and as to the indications on that head, to be discovered in the will which gave rise to the present suit; see *Newton v. Ayscough*, 19 Ves. 537. Lord Alvanley, in *Maberly v. Strode*, 3 Ves. 455, appeared to have no misgivings as to his decision of the principal case, but again made an analogous decree in the suit just cited. It should be mentioned, however, that, Sir John Leach, V. C. in *Cripps v. Wolcott*, 4 Mad. 15, observed, that, "*Perry v. Woods*" did not square with the other authorities.

3. A Court of Equity will never be disposed to put such a construction upon a will as would be likely to lead to an intestacy. If, therefore, words of survivorship are added to a tenancy in common, created by will, the Court, when there is nothing in the will negating the construction, will incline to hold that the benefit of survivorship was only given to prevent a lapse; not to prevent the vesting. *Wadley v. North*, 3 Ves. 367; *Maberley v. Strode*, 3 Ves. 455.

4. Wherever a will contains words plainly importing the testator's intention, that the interests he has bequeathed should be taken by the objects of his bounty as tenants in common; but, in the same will, he has used other words, which, in their ordinary construction, would be inconsistent with that intention, those inconsistent words will, if possible, be moulded so as not to destroy the effect of the words importing a tenancy in common. *Russell v. Long*, 4 Ves. 554. As to the words which create a tenancy in common, see *Davenport v. Hambury*, 3 Ves. 260; *Morley v. Bird*, 3 Ves. 631, in which last cited case it is observed, that notwithstanding the leaning of Courts in modern times in favor of tenancy in common, rather than joint tenancy, yet there must be some words of severance, when an interest is given to more than one, or that interest must be taken by them as joint tenants. This may sometimes lead to the inconvenience, as we have before seen, of preventing a legacy, given after a previous life-estate, from vesting, and even create a *quasi* intestacy as to the subject of gift: but, there are cases, in which a joint form of gift may be the only mode of causing a legacy to go in the course intended by the testator; as, for instance, where a bequest is made to infant natural children, who, in the case of the death of any, could not succeed to each other. *Stuart v. Bruce*, 3 Ves. 633.

5. It is a sound general rule of construction, that the words made use of by a testator shall be interpreted according to their legal effect and operation, unless it appear, with reasonable clearness, that he intended to use them in a different sense. *Thelluson v. Woodford*, 4 Ves. 329; *Jeffery v. Sprigge*, 1 Cox, 63; *Deane v. Test*, 9 Ves. 152; *Crooke v. De Vandez*, 9 Ves. 205; *Ex parte The Earl of Ilchester*, 7 Ves. 368; and see, *ante*, note 4 to *Blake v. Bunbury*, 1 V. 194.

executor of the said Henry Allen. *Barnes v. Allen*, Dec. 6th, 1782; Reg. Lib. A. 263.

(1) See the note, *ante*, vol. ii. 267.

ATTORNEY GENERAL v. YOUNG.

[1796, JULY 12, 14.]

INFORMATION decreed to be taken *pro confesso* upon two insufficient answers. (a)

THE object of this information was to have an account taken of what the Defendant had received as treasurer of the Philanthropic Society and to restrain him from proceeding to collect money in that character. After two insufficient answers an order was made on petition, that the cause should be set down, in order that the information should be taken *pro confesso*.

Mr. *Richards*, for the Information, cited *Abergavenny v. Abergavenny*, 4 Vin. 446, pl. 1. 2 Eq. Ca. Ab. 179, pl. 5; and said, Lord King's opinion in *Hawkins v. Crook*, 2 P. Will. 556, was over-ruled in *Davis v. Davis* 2 Atk. 21. *Bacon v. Griffith*, 9th and 14th December, 1772 (1), was also mentioned from the Register's Book: the answer having been accepted, the bill was amended; and there was no answer to the amendments: Sir Thomas Sewell ordered, that the bill should be taken *pro confesso* as to the amended part; to which there was no answer: but that order was discharged by Lord Apsley; who thought the application ought to have been general.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I rather think, Lord King was wrong. I have always taken it, that an insufficient answer was as no answer; and for a very good reason; for the Plaintiff, if he wants to bring on his cause, must either reply to an insufficient answer and go to a commission to prove his case, or set it down upon the bill and an insufficient answer; which is a situation no Plaintiff can be put into. But I must now decree this information to be taken *pro confesso*: I cannot do otherwise. If it ought not to be done, an application ought to be made to discharge the order for setting it down to be taken *pro confesso*. The costs follow of course; but to this time only.

1. In the ordinary course of the Court, and according to the existing practice, a bill may be taken *pro confesso*, after a demurrer, plea, or answer, overruled, or

(a) After the defendant's appearance has been entered, the complainant may have an order of course for an answer, or that the bill be taken as confessed. 1 Barbour Ch. Pr. 87; *Stafford v. Brown*, 4 Paige, 360. In a suit against husband and wife, if an order to answer separately has not been obtained, the husband must put in a joint answer for himself and wife, or the bill may be taken *pro confesso* against both. Ib. 89; *Bilton v. Bennett*, 4 Sim. 17; *Leavitt v. Cruger*, 1 Paige, 421. So, if not sworn to by both, and no valid defence is set up therein. *New York Chemical Co. v. Flowers*, 6 Paige, 654. And although an answer on oath is waived, the answer must be actually signed by the defendant, or it will be taken off the file for irregularity, and the bill be taken as confessed, if no valid defence is set up therein. *Denison v. Bassford*, 7 Paige, 370. So in case of insufficiency of the answer. 1 Barb. Ch. Pr. 97, 98. *Dangerfield v. Clairborne*, 3 Hen. & M. 17; *Caines v. Fisher*, 1 Johns. Ch. 8; *Clason v. Morris*, 10 Johns. 524. But the answer of an infant by his guardian *ad litem* cannot be excepted to for insufficiency. *Samuda v. Furtado*, 3 Bro. 70.

(1) 2 Dick. 473. See *Jopling v. Stuart*, *post*, vol. iv. 619.

declared insufficient. *Turner v. Turner*, 1 Dick. 316; *Davis v. Davis*, 2 Atk. 24; *Gregor v. Lord Arundel*, 8 Ves. 88. And, notwithstanding a full answer may have been put in to the original bill, yet, if the bill be amended, and the amendments are not answered, the bill may be taken *pro confesso*, generally; for the original bill and the amendments form but one record. *Jopling v. Stuart*, 4 Ves. 619. And, by the Bill now (1827) before Parliament for the regulation of Chancery Practice, it is proposed that, if any defendant shall have been taken into custody under a writ of attachment duly issued against him for contempt in not answering, or being in custody for any other cause, shall have been charged with or detained under such writ, and shall remain in custody under such writ or charged with the same, the Court shall, upon motion or petition on behalf of the plaintiff, (notice of which shall not be required,) and upon the production of the return to such writ, order that the bill be taken *pro confesso* against such defendant, unless he shall put in his answer within three weeks after personal service of such order. And if any defendant, being taken under, or served with a writ of attachment for contempt in not putting in an answer, but being admitted to bail, shall not remain in the custody of the sheriff, and shall afterwards, under the process of the Court, be committed to the prison of the Fleet for his said contempt, the plaintiff may sue forth the several writs of *habeas corpus*, and *alias habeas corpus*, as heretofore in the like cases, provided that there shall be at least fifteen days between the returns of such writs, and that in the order for such writ of *alias habeas corpus*, the Court shall direct that the plaintiff's clerk in Court do attend with the record of the bill, in order that the same may be taken *pro confesso*; and upon the return of such writ of *alias habeas corpus*, in case the defendant shall not have put in his answer, the Court shall order the bill to be taken *pro confesso* against such defendant, in the same manner as is now usual, in the like cases, upon the return of a writ of *alias pluries habeas corpus*, and such decree shall thereupon be made as shall be thought just.

2. As to the course to be pursued, in order to have a bill taken *pro confesso* under the statute 5 Geo. II. c. 25, see *Neale v. Norris*, 5 Ves. 1; *Bishop of Winchester v. Beavor*, 5 Ves. 113.

3. Where a decree upon a bill taken *pro confesso*, is made after appearance, according to the ordinary course of the Court, it can only be impeached by bill of review, or a bill to set it aside for fraud. When a similar decree is made under the before-cited statute of 5 Geo. II., the sixth section of that statute prescribes the conditions upon which proceedings may be recommenced, as if no such decree had been made. *Ogilvie v. Hern*, 13 Ves. 564; *Short v. Downer*, 2 Cox, 84; *Mawer v. Mawer*, 1 Cox, 104. It is with this qualification, that the *dictum* in *Landon v. Ready*, 1 Sim. & Stu. 44, must be understood; where it was intimated, there is no difference whether a bill is taken *pro confesso* before, or after appearance: see *Nodes v. Battle*, 2 Ch. Rep. 284; *Anonymous Case*, 2 Freem. 124: but whether a bill be taken *pro confesso* in the ordinary course, or under the statute, such decree is (equally in either case) to be made as in the judgment of the Court shall seem just; the plaintiff is not allowed to take such a decree as he chooses to abide by. *Geary v. Sheridan*, 8 Ves. 192; *Knight v. Young*, 2 V. & B. 186.

HALLIDAY v. HUDSON.

[1796, JULY 16.]

REAL and personal estate devised to the executor in trust to pay debts and legacies; the rest and residue to himself: the only purpose of devising the real appearing to be to insure payment of the debts, without any intention to disinherit the heir, it was held only a charge, and that the heir was entitled to the surplus of the real estate. (a)

ROBERT HALLIDAY by his will, duly executed to pass real estate, first appointed his nephew Hudson sole executor in trust to execute it in manner following. Then he gave and bequeathed to him all his lands, tenements, and leaseholds in the parish of Bradford, Wilts, except a dwelling-house, which was subject to a life estate: after the expiration of which he gave it to his nephew Robert Halliday for life; remainder over. He then gave Hudson all his goods and chattels, stock in trade of every kind whatsoever, all money due to him at his death, and with every utensil belonging to the trade, "in order to enable him to discharge all my just debts and legacies." Then after a legacy of 200*l.* to Hester Philips, a servant, to be paid by his executor in 12 months with 10*l.* interest, and a farther legacy of 20*l.* to be paid to her in a month, as he thought himself really indebted to her for wages, "My situation is such, that I am obligated to make a will; for if I should do otherwise than well, my heir would come in for all my lands, and my just debts would remain unpaid; as I owe my niece Maria Hudson near 600*l.* She has no security whatsoever. Also I shall owe my niece Silvia Hudson 400*l.* at coming of age; which my executor is to discharge with some few other debts: the rest and residue I give to my executor before named."

By a codicil with only two witnesses the testator appointed Halliday executor of his will jointly with Hudson, and gave Halliday 100 guineas over and besides what he had given him by his will.

He also gave him 100*l.* in trust to pay the interest till twenty-one or marriage, and then the principal, to the daughter of his niece Silvia Palmer. He gave Hudson and Halliday all his household goods and household furniture of every kind, to be equally divided between them, but not to be sold upon any account. Then giving some other small legacies, he, in other respects, confirmed his will.

Halliday, who was heir at law, filed the bill to have the usual accounts; claiming the real estate subject to the debts. The Defendant claimed under the devise of the residue the [*211] real estates not specifically devised. The decree directed the accounts; and declared, that if the personal estate should not be sufficient for the debts and legacies, the deficiency should be raised out of the real estates devised for that purpose. The point came on upon exceptions.

(a) See *ante* note (a) to *Kidney v. Coussmaker*, 1 V. 436.

Mr. Lloyd for the Defendant, cited 1 Eq. Ab. 272. *Rogers v. Rogers*, For. 268.

LORD CHANCELLOR [LOUGHBOROUGH]. I think, the words "rest and residue" are of ambiguous construction, if the rest of the will did not afford a key to them. The case would stand stronger for you, if it was the reverse of those cases cited; if no notice was taken of the heir, if the testator had no knowledge of him; or if he disliked him, and expressed any want of inclination or favor towards him. But that is not the case. The particular circumstance of this will is, that he has declared a particular purpose of making a will; namely, to pay his debts only. The Court in several cases has exercised a power, which is to be exercised with great discretion, in conjecturing against the heir. The peculiarity of this case is, that there is clearly upon the face of the will and codicil no disinclination to the heir, no intention to disinherit him. A house is given to him for life after the death of another person, who had it for life. Then he says in the most distinct terms, the inducement for making a will affecting real estate is an apprehension, that his creditors would not have justice, that his debts would not be paid; and he mentions two large debts. Then he has declared, that the only purpose, for which he devises real estate, is, that his debts shall be paid. The manner, in which he proposes to do that, is, that the executor is to take them in trust for that purpose; continually describing him as executor. In this case it is not a conjecture, but a necessary implication, that if he had been advised, that a charge upon his real estate would have been sufficient, he would have done nothing more. It would be a little too bold to hold in this case, that so much of the real estate, as is not applied to the debts, should not go to the heir (1).

1. WHEN a testator has directed a conversion "out and out," (in other words, that his real estate shall in all events be sold, and converted into personalty,) and has made a complete disposition of the claims of the heir at law are, of course, excluded. *Mallabar v. Mallabar*, Ca. temp. Talb. 80; *Durour v. Motteux*, 1 Ves. Sen. 322; *Kennell v. Abbott*, 4 Ves. 810; *Lowes v. Hackward*, 18 Ves. 171. But, where such conversion is only directed with reference to a particular purpose, which fails altogether; (*Trygonuwell v. Sydenham*, 3 Dow, 210; *Jones v. Mitchell*, 1 Sim. & Stu. 294;) or in part; (*Ackroyd v. Smithson*, 1 Brown, 513;) or which does not exhaust the produce of the real estate directed to be sold; (*Maughan v. Mason*, 1 V. & B. 416; *Ashby v. Palmer*, 1 Meriv. 301; there will, in all these cases, be a total, or a partial resulting trust in favor of the heir at law. *Gibbs v. Ougier*, 12 Ves. 416. See farther observations and authorities as to this matter, *ante*, in notes 2, and 3, to *Kidney v. Coussmaker*, 1 V. 436.

2. In *Kellett v. Kellett*, 1 Ball & Bea. 546, Lord Manners, after a review of the leading authorities, and particularly adverting to the principal case, (which, however, his Lordship considered as having turned pretty much on its own peculiar circumstances,) made an analogous decree.

(1) *Robinson v. Taylor*, *ante*, vol. i. 44, and the notes in pages 45, 204.

STUART v. EARL OF BUTE.

[1796, JUNE 1, 3; JULY 18.]

TESTATOR gave all his waggon-ways, rails, staiths, and all implements, utensils and things, at his death used or employed together with or in or for the working, management or employment, of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held, used or enjoyed, with the collieries: under this bequest and upon the circumstances money due from the fitters and others and in the Tyne bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and various other articles of the stock in trade, passed, (1) (a)

LORD BUTE by his will directed his debts, except by mortgage, his funeral expenses and legacies, to be first paid out of his personal estate not specifically disposed of; and declared, that his son James Archibald Stuart was so amply provided for by the will of his grandfather Edward Wortley, that he did not stand in need of any assistance. Then reciting an agreement upon the marriage of his son Charles Stuart to charge his collieries, lands and hereditaments, in Northumberland and Durham with a rent charge of 600*l.* to be settled as therein mentioned, with a covenant by him to answer any deficiency, he devised and bequeathed all and every his freehold and leasehold collieries, lands, tenements and hereditaments, and parts and shares of freehold and leasehold collieries, lands, tenements, and hereditaments, in the counties of Northumberland and Durham, to trustees, their heirs, executors and administrators, upon trust to grant such rent charge accordingly; and subject thereto for Lady Bute for life; and after her decease for all and every the children of his son James Archibald Stuart, except the eldest for the time being, according to the appointment of their father; and in default of or until appointment, for all, except the eldest, during the life of their father, equally; and after the decease of James Archibald Stuart, in default of his appointment, for all and every the children of his said son, except the eldest, equally, share and share alike, as tenants in common, their executors, administrators and assigns, according to the nature and tenure of the said property. The testator then reciting his power to appoint the sum of 19,000*l.*,

(1) Decree reversed; *post*, vol. xi. 657.

(a) As to what property legatees are entitled under particular modes of description of the things bequeathed, see 2 Williams, Exec. 854-868, and the authorities there collected. The word "goods" is *nomen generalissimum*, and when construed in the abstract, will comprehend all the personal estate of the testator, as stock, bonds, notes, money, plate, furniture, &c. Ibid. *Kendall v. Kendall*, 4 Russ. 370; *Jackson v. Robinson*, 1 Yeates 101; S. C. 2 Dall. 142. Under a bequest of "all things" in a particular house, bonds and other choses in action will not pass. Ibid. *Arnold v. Arnold*, 2 My. & K. 374. What passes by the words "stock on farm." *Cox v. Godsolve*, 6 East, 604 note; *Steward v. Cotter*, 5 Russ. 17. By the word "moneys;" *Vaisey v. Reynolds*, 5 Russ. 12; *Benson v. Whitam*, 2 Sim. 493; *Ommaney v. Butcher*, 1 Turn. & Russ. 272; *Gosden v. Dotterell*, 1 M. & K. 56; *Douglass v. Congreve*, 1 Keen, 410; *Mann v. Mann*, 1 Johns. Ch. 231; S. C. 14 Johns. 1; *Fryer v. Ranken*, 11 Simon, 55.

created a trust as to 15,000*l.* part thereof, to make good any deficiency of those estates to answer the rent-charge, and to pay the surplus interest to his son Lord Mount Stuart for life, to be disposed of by him for the benefit of his younger children; and after his death among them equally, subject to his appointment: the remaining 4000*l.* he directed to fall into the residue: "And I give and bequeath all and every the waggon-ways, rails, staiths, and all implements, utensils and things, which at the time of my death shall

or may be used or employed together with or in or for the
[* 213] working, management or employment, of any of the said collieries or shares of collieries, and which are or shall or may be deemed or considered to be as or of the nature of personal estate, unto my executors hereinafter named, upon trust to permit and suffer the same to be from time to time held, used, or enjoyed, by the person or persons respectively entitled by virtue of this my will to the use and enjoyment of my said several freehold manors, messuages, collieries, lands and hereditaments, or parts or shares of freehold manors, messuages, collieries, lands, and hereditaments, in the said counties of Northumberland and Durham, as far as the nature of the said property and the rules of Law or Equity will admit." He then gave his household furniture and other articles at his house at Luton to Lord Mount Stuart; and after devising some other real estates and giving some legacies, gave all the rest and residue of his personal estate and effects to his son Charles Stuart.

The bill was filed by General Stuart, the residuary legatee. By the decree pronounced upon the 20th of March, 1793, it was referred to the Master to inquire and state, what were the waggon-ways, rails, staiths, implements, utensils and things, which at the death of the testator were used or employed, and in what manner, together with, in or for, the working, management or employment, of any of the said collieries or shares of collieries, which were or might be deemed or considered to be as or of the nature of personal estate; and particularly, whether any and which of the articles specified in the schedule to the bill were at the testator's death used or employed, and in what manner, together with, in or for, the working, management or employment, of any of the collieries or shares of collieries; with what funds, by what means, and under what partnership and other contracts and agreements, the collieries or shares of collieries were managed and carried on at the death of the testator; and to state the establishment of the partnership, and in what manner the same has been carried on. By the report, 5th March, 1794, the Master found by the affidavit of Morley, Lord Bute's agent, and Walton, another agent, that articles of partnership were entered into for 99 years, dated the 27th of June, 1726. No capital was formed previously: but the partners from time to time advanced the money necessary. The agents took an account every December of the stock, which was not more, after paying the debts, than was necessary for carrying on the colliery. The custom of the partnership was to draw upon the fitters monthly. No certain sum

was left in their hands; nor was there a stated time for making a dividend. By the schedule to the report all the different articles of stock, including all the articles, that were the subject of the exception, were stated and valued at the death of the testator: the coals at the pits and staiths at 2899*l.* 12*s.* 8*d.*: the balances due from the several fitters, amounting to 10,371*l.* 13*s.* 8*d.*: the money in the Tyne Bank 5512*l.* 19*s.* 6 *l*-2*d.*: the balance in the hands of Clarke, the cashier, 656*l.* 17*s.* 4*d.*: and balances due from several persons, 5632*l.* 10*s.* 10*d.*

Upon the 2d of July, 1794, it was referred back to the Master to inquire, under what articles or agreement and how the partnership was carried on; also to state, which of the particulars set forth in the schedule to his report were necessary; and in what respect, for carrying on the colliery, and to state his opinion thereupon.

The Master by his report, 30th November, 1795, stated the articles; and that he was of opinion from the evidence, that all the particulars in the schedule to his former report were necessary for carrying on the colliery. To this report the exception was taken by the Plaintiff; for that the Master ought to have excepted, as not specifically necessary, money due from the fitters, money in the Tyne Bank, balance of the cash book in Clarke's hands, balances due from several persons, coals resting at the pits and staiths, corn, hay, horses, timber and deals, oil and candles, and also all waggons and waggon materials, waggon ways and materials belonging thereto, fire engines, machines and gins not erected and fixt, ropes, iron and materials at the pits, stables, store-houses, and horses' trappings, gears, &c., not absolutely employed or used at the testator's death, together with, in or for, the working, management and employment, of any of the collieries or shares of collieries.

On the 27th of April, 1796, it was referred back to the Master to state, in what respect and why the several articles mentioned in the schedule to his first report were necessary. The Master by his report, 29th April, stated, that it was satisfactorily proved to him by the evidence stated in the two former reports that those different *items* were necessary for carrying on the partnership trade. For that reason he was of opinion and still is so, that Walton and Marlow having been so long agents to the partnership must be better acquainted than any one else with the nature and quantity of materials, money, and other particulars, mentioned in the schedule as necessary for carrying on the trade; which made their affidavit * a satisfactory proof to him, that all the said [*215] particulars are necessary both as to quantity and quality; that no other evidence was produced: but from the nature of the trade collected from those affidavits and the copy of the articles and the admission of the parties, it appears to him, that all the items in the said schedule must be essentially necessary for working the colliery and carrying on the trade; particularly the money in the Bank and in the cashier's hands must necessarily be always considerable; as all contingent expenses and workmen's wages are paid out of this

fund, and must be very large in the great trade, they carry on; and the workmen must be paid as soon as their wages become due.

LORD CHANCELLOR [LOUGHBOROUGH]. I have found what, if I had recollected it a little sooner, would have saved a great deal of trouble in this cause. It did not occur to any one; and I do not wonder at it. I had not much doubt in my mind upon the question: but the very question has been decided; and there can be no possible argument upon this case, as it strikes me. Lord Bute brought a bill in this Court, claiming under an appointment made by Lady Bute under the will of Mr. Wortley; in which he had in terms very little different from this will disposed of all his collieries and coal mines and all his stock in the coal trade, and all his vessels, ships and boats, and all his lands, tenements, hereditaments, goods and chattels, in the counties of Northumberland and Durham, so, that it was contended, that Lady Bute had an absolute power of disposing. The question came before Lord Northington, whether upon the whole of the will it was not confined to a disposition by sale. That was the opinion of Lord Northington; and that opinion was affirmed by the House of Lords on appeal.

In that cause this question was raised; that the words in the will could not extend to carry the balance of cash in the Bank of Mr. Child, (for there was no Tyne Bank at that time) the balances in the hands of the fitters and the cash in the hands of the agent; but they were part of the general personal estate. Lord Northington was of opinion, that all these sums passed under the general disposition of the collieries and all belonging to them in the words, I have stated. The determination under that decree gave Lady Bute this

interest: upon the construction she was to be only tenant [*216] for life of the profits to be laid out annually: but *Lord

Northington being of opinion, that she had a power of sale, and a sale of the whole interest, did direct a sale. It was proposed, that Lord Bute should be the purchaser: but the trustees acting for infants would not execute the conveyance according to the appointment of Lady Bute without the directions of the Court. Lord Bute filed a bill to have the sale made under the direction of the Court. A valuation was made of what the interest in the collieries was worth; and evidence was given of the valuation, and all the articles in dispute were valued in that valuation; and the same evidence with the affidavits before the Master in this cause was given; to the same effect; but rather more pointed and explicit. Featherstone, the agent, was examined. I have kept my brief in both the causes; and I have the valuation (1) of Leaton and Wal-

(1) That valuation, among the debts, money, materials, and stock, enumerated, particularly states debts in the hands of the fitters 16,667*l.* 1*s.* 5 1-4*d.*: cash in the Bank at Newcastle 16,505*l.* 8*s.* 3 1-4*d.*: cash in the hands of Dobson: 1201*l.* 17*s.* 11 1-4*d.* Coals at the staiths were valued at 377*l.* 10*s.* 9*d.* Parts of ships, waggon-way, waggons and other stock, stock of engines and other materials, are also particularly valued. The agent Featherstone deposed, that the accounts were annually made up: but it was not usual for the partners to sign them; but

ton, either the original or a copy, upon which Lord Bute became the purchaser at the sum of 41,166*l.* 18*s.* 6*d.*: and gave security upon the Luton estate for that sum. Considering, that they acquired the property in this way and according to that valuation, and upon the ground, that all these articles were necessary for carrying on the trade, the question is not now open. In the cases in the House of Lords (1) you will see Mr. Wortley's will. It is impossible, that any argument can arise now, as it strikes me. Lord Bute purchases all these articles; materials, cash, the debts due to the partnership, for one gross sum, as the value of that interest Mr. Wortley had in it; and the only way of making it profitable was by taking the whole together. It all rests upon evidence; and all the parties are parties claiming under the person, who took it upon that valuation and sale. I will have all those proceedings entered as read, before I finally dispose of this cause. I have the evidence, that all the cash in Child's Bank and in the hands of Featherstone, the agent, and the fitters, was necessary to carry it on. No one of the partners has any right to that money *qua* money. It is only one of the materials, *by which the profit is produced; and each of the [*217] partners is entitled to a third of that profit. The same question arises between Mr. Wortley's general representative and the persons claiming the colliery, and Lord Bute's general representative, and the persons claiming the colliery; and the words of Mr. Wortley's will are almost identically the same.

July 18th. Lord CHANCELLOR. Perhaps, if I had been advised of what had passed, when this property first came into this Court, that Lord Bute under a decree to sell the interest in this colliery had taken it to himself, it would have been necessary to have proved nothing more, than that the subject remained in him, unaltered, in the same state that it was acquired; for I should have referred to the evidence in that cause, and the same evidence has been given now, explaining correctly and distinctly the nature of a subject, which, seldom coming under discussion here, we are the less acquainted with. I am satisfied, the Master has drawn a just conclusion with regard to all the articles, he has stated to be necessary for carrying on the colliery. The principal article, upon which, as an instance, the difficulty is most pressed, is considering a specific sum of money deposited in a specific place as specifically necessary. That money or credit is necessary for carrying on every trade, no one can doubt: but that the particular identical sum is specifically necessary, is a proposition, that certainly admits a good deal of consideration, and may upon the first state of it raise some doubt. But I am satisfied, that the Master has considered it very properly. In the former cause the money in Mr. Child's shop was held to pass as

they acquiesced in the accounts. In December, 1760, 15,596*l.* 4*s.* 3 1-4*d.* was due from the fitters; 8521*l.* 9*s.* 5*d.* was in Child's Bank: 1502*l.* 7*s.* 2 1-4*d.* was in the hands of Featherstone. The cause was heard on the 5th of December, 1763.

(1) 5 Bro. P. C. 534. As to the result of that case, as represented here, see Lord Eldon's judgment upon the re-hearing, *post*, vol. xi. 633, in *Stuart v. The Marquis of Bute*.

stock in trade: there is no determination upon it: but the Court did as strong a thing; for the whole of the articles were sold by the decree in a case, where infants were concerned; and under that the cash in Child's shop was transferred to Lord Bute. I do not consider this at all as money; and it is not a fair way of considering it. It has not any of the qualities of money. It is not at the command of the party. It is not used as money. It yields no interest. There is no account of interest upon it. He cannot command it. He cannot give a draft upon it. It is as much a part of the machinery of the colliery as any of the engines used to procure the

[*218] general result of profit of all the component parts *real and personal, that enter into this trade. Several of the materials are in the same situation. The very oil, with which the wagon-wheels are greased, pays its share of the profits of the trade to the parties. The money is in the same situation. It lies dead and unproductive in the hands of the banker, till issued in the course of the trade; and the only account is, that upon the general account they receive benefit from the employment, as from the employment of the horses, hay and corn, and every part of the machinery used in working the colliery. Therefore it is correctly stock in trade; not in that course of use, in which a proprietor of money making profit of it as such is to employ it. The money is the principal article. One is apt to consider money of the same nature as in other cases; but in this case it is evident, it yields no advantage but in the shape of that contingent profit annually divided, if the state of the trade admits a dividend annually: but there are years in this very trade, in which the expense outruns the profit, and the dividend must be postponed. I am clearly satisfied upon the nature of the subject, and the manner, in which it is bequeathed, the testator intended, that without diminution every thing composing the interest in the partnership, the profit to be made of that partnership, should go with the colliery.

The manner, in which the property was acquired and held by the testator, has considerable weight upon the exposition of the will. Lord Bute had soon after Mr. Wortley's death become the owner of his interest in this business, consisting of a great colliery founded upon a real estate, but that could only be productive by being combined with a vast many articles, that in their nature may be movable, and articles of personal property. It is apparent, he intended to return that property into the family of Mr. Wortley: which is also part of his own family: not giving it to the immediate representative of Mr. Wortley, who had a large family and a great estate. It occurred to him, that it would be more beneficial to make it a provision for the younger children. If the consequence urged by the residuary legatee takes place, the necessary effect will be to defeat entirely the primary purpose. The trustees cannot borrow money. They have no power to raise money. They have no power to charge or lay out any sum of money. Lady Bute at her time of life, if obliged to lay out money to procure a benefit from

this stock, would have no benefit from it. It would be a great deal too much for her to lay out money to entitle herself to a benefit * for life from it: the infants could not have [* 219] money raised for them; so, if it was unfortunately necessary to separate any of these articles, the balances, coals, &c. all the advantage intended to be given would have been defeated for a considerable time; and the professed object was to increase her provision and to make a provision for the younger children, by which they might be maintained, not at the expense of their father. According to this argument, they must have waited till this fund had cleared itself. I do not conceive, the words of Mr. Wortley's will are more significant or speak more plainly an intention to annex all these articles, that may be deemed of the nature of personal estate, to the interest of these collieries, and to except them from the subsequent disposition of the personal estate, than these words. The only rule, I can draw, is, that for determining the extent of the bequest I must consider the nature of the property. In general "things" may be very properly restrained to things *ejusdem generis* (1). Here the nature of the property, of which it is impossible to suppose him, who had possessed it so long, not informed, is such, that though it is literally true, he had an undoubted interest in every specific waggon and quantity of coals upon the staiths and the other articles, yet it is correctly true, that he never had the use of them, as a man has the use of his movable property and general personal estate, the disposal of them *ea forma*, in which they existed. Therefore they could not be understood by him as specifically component parts of his personal estate. The only way, they were useful to him, or that he could derive any profit from them, was in the result of the annual account. The renewal of them was not bought by his money: nor was any of the partners consulted upon it: but the credit and stock of the different partners were formed originally by the accumulation of profit. The use was not of the article by itself, but being entitled upon the whole together to a share of profit, when profit arises. The several proprietors never knew any thing of the manner, the stock was renovated. That was by deduction out of the produce. The supply was carried on by the different overseers, and without a specific direction the stock was continually renewing prior to any dividend of profit. All therefore he knew, all he felt, as owner with regard to this property, was this circumstance: that at a certain period (in this case for several years it has been annual) a profit is coming to * them. These profits [* 220] he intended to give, as he enjoyed them, to Lady Bute for life, and afterwards as a fund of provision for these children; which intention could not be obtained without that construction, which, I think, the words will clearly admit of; that these articles are separated from the general personal estate and annexed to the interest in the colliery. Mr. Wortley's will is very correctly drawn: but it

(1) *Boon v. Cornforth*, 2 Ves. 277.

is not plainer than these words. General Stuart is appointed residuary legatee at the close of the will: but it is at the close of a will, in which the testator emphatically severs these things from his general personal estate. He does not give the use of the things, but the receipt of the profits, to Lady Bute and these children; and they are to enjoy, as far as the nature of the property will admit. That will be not in any shape except by entitling them to a third of the profit. That is the only method, in which these things can be used and enjoyed; and that was the method, in which he had used them; and for the purpose, that the enjoyment may be complete, he separates them from his general personal estate. The word "things" therefore is not a loose expression. From the nature of the subject and interest devised and the interest of all the parties I am bound to give the words the plain sense, they will bear; that these things shall not go as the general personal estate, but with the colliery; that the use may be such, as it was, when he received the profit, and while he enjoyed it. He intended the devisees to have the same enjoyment, that he had; for it is to be subject only to the annuity to General Stuart; which he had always paid himself. Therefore declare, that these articles under the words of the bequest are to be held by the executors for the persons, who are entitled to the use and enjoyment of the collieries. The costs of the cause must come out of the colliery fund (1).

1. THE case of the *Earl of Bute v. Stuart* (upon which Lord Rosslyn placed considerable reliance, as an authority for the decision made by him in the principal case; but which Lord Eldon, on the rehearing, thought very little applicable) is reported in 2 Eden, 87.

2. The meaning of the words "estate," or "effects," or "things," if used in a clause containing an enumeration of the testator's personal estate, will, in general, be confined to estate, or effects, or things, *ejusdem generis* with those enumerated, as being the most natural construction, when unexplained by the context. *Rawlings v. Jennings*, 13 Ves. 46; *Hotham v. Sutton*, 15 Ves. 326. Lord Hardwicke repeatedly decided, that under a bequest of the testator's house, "and all that should be in it," at the testator's death, cash passed, and bank notes, which, his Lordship held, were to be considered as cash, (*Southcote v. Watson*, 3 Atk. 232; *Popham v. Lady Aylesbury*, Ambl. 68; *Chapman v. Hart*, 1 Ves. Sen. 273,) but not promissory notes and securities, as they are only evidence of title to things out of the house, and not things in it. Lord Thurlow, in *Moore v. Moore*, 1 Brown, 129, Lord Redesdale, in *Fleming v. Brook*, 1 Sch. & Lef. 319, and Richards, C. B. in *The King v. Capper*, 5 Price, 265, have referred to these decisions, and treated them as binding authorities; and Lord Mansfield, in *Miller v. Race*, 1 Burr. 457, seems to have been clearly of Lord Hardwicke's opinion, that, under a bequest of cash, bank notes would pass; and were not to be considered as securities for money, but as money: the same rule was admitted, *arguendo*, in *Hotham v. Sutton*, 15 Ves. 234. But this doctrine must be received with less implicit confidence, in consequence of the intimation thrown out by Lord Eldon, on the rehearing of the principal case.

(1) This decree, affirmed upon a re-hearing by Lord Eldon, C. but with great doubt, and a recommendation to appeal, was reversed by the House of Lords: *Stuart v. The Marquis of Bute*, *post*, vol. xi. 657.

ATTORNEY GENERAL v. BOULTBEE.

[1796, MARCH 11; JULY 21. — ANTE, VOL. II. 380.]

DECREE affirmed.

THE Defendants appealed from the decree of the Master of the Rolls, reported *ante*, Vol. II. 380 (1).

The Lord Chancellor declined hearing the cause on account of the interest, his Lordship by virtue of his office had in the subject (2). His Lordship referred the appeal to Lord Chief Justice Eyre and Lord Chief Baron M'Donald; before whom it [* 221] was argued at great length on the 10th and 11th of March, at Serjeant's Inn Hall.

March 11th. EYRE, (a) CHIEF JUSTICE. This case is certainly new in its circumstances; and the circumstances, in which it is new, create considerable difficulty. They appear to have produced that effect upon the mind of the Master of the Rolls; who gave the case great consideration. We, upon whom the duty of examining the decree has been thrown by the Lord Chancellor, wish also to take it into serious consideration: we will therefore give judgment this day se'nnight. Thus much I will say now. In my judgment the ground taken by the Master of the Rolls for the decision was very judiciously taken, and was in truth the only ground, that could be taken to support the decree; for I cannot think, that after almost the judicial decisions made upon this trust by successive Chancellors, who have received the recommendation, this trust can now be narrowed to a mere approbation; and even beyond that; for the argument requires, not a simple approbation previous to the presentation, but the not being able to show ground of disapprobation after the presentation. Sir Francis Nethersole did mean, as far as the nature of the case admitted, to purchase the patronage. I say, as far as the nature of the case admitted, because it would admit it only to a certain degree. All, he could do, was to create a trust, that would influence the Crown in favor of the nominee of him or his trustees. Therefore a person claiming the benefit must claim it as having been named by the trustees. But a new and difficult question arises, where something is to be imputed to the trustees, and it may be said, the act of the trustees has disappointed part of the trust. Undoubtedly there were two objects. The first and principal object was the augmentation of the vicarage: but undoubtedly part of the object was to secure in effect the presentation to him, and those, who were to have the management of the trust; and the question is, whether, where the whole is disappointed by the act of the trustees, the Court

(1) See the notes to that Report.

(2) For the same reason Lord Thurlow had originally refused to hear the cause.

(a) The last judgment, before the present, of this distinguished magistrate in this Court, was as one of the Lords Commissioners. See *ante*, note (a) to *Nabob of the Carnatic v. East India Co.*, 2 V. 59; and notes 1 V. 270, 485.

consistently with its general rules in the regulation of charities can attend to the principal object and support that, rejecting the qualification, where it belonged to the trustees themselves to bring forward the qualification, and they have neglected it. At present I agree with the Master of the Rolls, that there was a reasonable time for them to produce their nomination; and dealing with the Crown they ought to have done so; and they ought not to have expected that *intercourse, which, if it does take place, is mere grace and favor; and the only question is, what will be the effect of their having put the case into this extraordinary situation, that now by the presentation *constat de persona* as to the object of the bounty, and they have made it impossible, that he should have that qualification, which the donor has required. I am not prepared to say, what will be the effect of that, consistent with the general rules, that govern the Court as to charities. Therefore I think the ground was very judiciously chosen by the Master of the Rolls, as the only ground, with regard to which any question could arise.

July 21st. Lord CHANCELLOR [LOUGHBOROUGH]. I have received the certificate in affirmation of the decree from the Chief Justice of the Common Pleas. Affirm the decree.

SEE, *ante*, the notes to S. C. 2 V. 380.

STRODE v. BLACKBURNE.

[1796, FEB. 11, 12; JULY 22.]

BILL by tenant for life in possession for discovery and delivery of the title-deeds: plea, a mortgage in fee by a former tenant for life alleging himself to be seised in fee, without notice, ordered to stand for an answer with liberty to except. (a) Mortgagee of an estate, partly in settlement, must discover the boundaries, [p. 225.] Title-deeds are incident to the possession under a freehold title, (b) [p. 225.] Pawnee of a bailee must discover, so as to enable the owner to bring an action, (c) [p. 226.]

THE bill stated the following case. John Blower upon the marriage of his daughter Ann with Samuel Strode, the Plaintiff, settled certain freehold estates to the use of himself for life; remainder to the use of his said daughter for life; remainder to the children of the marriage as tenants in common in tail; and for default of such issue, as to part to his son Samuel Blower, as to the rest to the survivor of Strode and his wife, in fee. John Blower continued in possession till his death in 1792: then Ann Strode took possession, and has been in possession ever

(a) See *ante*, notes to *Jerrard v. Sanders*, 2 V. 454.

(b) As to the comparative unimportance of the title-deeds in the United States, see note (a) to *Ford v. Fering*, 1 V. 72.

(c) 1 Maddock, Ch. 206.

since, and became entitled to the possession of all the title-deeds: but they have been by John or Samuel Blower delivered to the Defendant Alice Blackburne; and she has them in her custody. The Defendant pretends, that in consideration of 1000*l.* John Blower by lease and release, 10th and 12th December 1791, conveyed the said estates to her and her heirs, subject to redemption; and in January 1792 surrendered a copyhold estate as a farther security; and upon that mortgage the title deeds were delivered to her; and she has a right to retain them. The bill charged, that neither of the Plaintiffs were privy to the mortgage; and they did not know of it, or that the deed had been delivered to the Defendant, till a considerable time after the death of John Blower; and it prayed, that the Defendant might be compelled to deliver up all the title
 * deeds and evidences in her hands, custody, or power, re- [*223]
 lating to the said premises.

As to so much of the bill, as sought, that the Defendant should discover, whether any of the title-deeds relating to the said premises, except the indentures of the 10th and 12th of December, 1791, were in her custody, and should set forth a list of, and be compelled to deliver up, all evidences and writings in her custody relating to the said premises, except the said indentures of 1791, the Defendant pleaded, that in December, 1791, John Blower being in quiet possession of the premises mentioned in the bill, and alleging himself to be seized in fee in possession, and being also in possession and having the disposal of the title-deeds and evidences in writing relating thereto, applied to her to lend him 1000*l.* upon mortgage of the said premises and a copyhold estate. The plea then set forth the indentures, by which the said estates were conveyed to her and her heirs, subject to redemption, with the usual covenants for a good title, that the mortgagor was seized in fee, and had a right to convey. The plea contained averments, that the Defendant had no notice of the settlement, that the money was still due, and the other usual averments, and was supported by an answer denying notice.

Attorney General [Sir John Scott] and Mr. Cooke, for the Plea, insisted upon *Jerrard v. Saunders ante*, Vol. II. 454, and *Fagg's Case*, there cited, that against a purchaser for valuable consideration without notice the Court has no jurisdiction.

Solicitor General [Sir John Mitford,] and Mr. Romilly for the Plaintiffs, contended, that that rule applied only where the Defendant was in possession and endeavoring to defend that possession: but the Court would not sever the deeds from the possession.

LORD CHANCELLOR [LOUGHBOROUGH]. As this case is now argued by the *Attorney General*, it is a point of a great deal of importance, and requires great consideration; for if this plea in the extent, to which it is now carried, holds good, I doubt, the consequence to all the settlements in the kingdom will be very mischievous; for in fact the tenant for life is trusted with the possession of the deeds. I suppose, there is not an instance to the contrary, except where there is some suspicion; and if he has it in his power by making

a bad mortgage to deliver over all the title-deeds, however ineffectual the mortgage may be, the vexation and mischief to the persons entitled under the settlement would be endless. I now wish it to be considered, whether that rule, that the Court will not interfere at all against a purchaser for valuable consideration without notice, is so absolute, that he will not be compelled to discover that, which may benefit the Plaintiff and cannot injure him. Suppose, you have a term, of which you could avail yourself to turn the Plaintiff out of possession, there might be reason to hold that back ; but you have a number of title-deeds, that can by no possibility aid your title as mortgagee, and enable you to recover in any respect against the Plaintiff ; but which may be very material to the Plaintiff : is there any conscience, that you should make your own terms as to them, and drive the party to a hard bargain ?

July 22d. Lord CHANCELLOR. Upon this plea it was contended, that as the Defendant states herself to be a mortgagee for valuable consideration without notice, and as such has had the title-deeds delivered to her, this Court has no jurisdiction to grant relief or to compel a farther discovery, than is made by the plea ; which is in effect a plea in bar to the discovery, as well as the relief. For the Plaintiff it was contended, that being in possession of the estate to which the deeds are incident, and having therefore as the owner in possession the legal right to the deeds, he is in the common case as to the discovery of requiring the Defendant to set out that, which the Plaintiff may recover at law, by such a description as to make it the subject of an action of detinue or trover. The question appears to me to deserve great consideration. On one hand it would be extremely dangerous to break in upon that security, that a purchaser for valuable consideration is entitled to hold, that secrecy, he has a right to observe, with regard to the circumstances, by which his title is composed. On the other hand it would be a very pernicious consequence, if title-deeds, which in the ordinary course of business rest in the possession of the tenant for life (1), were so at his disposal, that they should be put out of the power of the remainder-man. The tenant for life would be enabled very fraudulently to convey from the remainder-man, perhaps the title to his estate ; though he could not by any act of his own affect, bar or injure, that estate. The question therefore has a very general extent.

It had occurred to me, and upon full consideration the [* 225] * same idea remains in my mind, that the plea of purchase for valuable consideration without notice is a shield to the possession ; and I find it very difficult to imagine a case, in which it can be used for any other purpose than to defend the actual possession. It was stated very truly by the Attorney General, that in the plea it is not said, it is to maintain the possession : and it is obvious, if I am right, that no such statement should be found in any plea ; for *ex hypothesi* the Defendant is in possession of that, which he seeks

(1) *Ante*, vol. i. 76.

by the plea to defend. The Plaintiff is seeking to obtain what he does not enjoy; the Defendant is seeking to protect himself in the possession of that, which he holds; and in this case the supposition is, that the Defendant is in possession of the deeds; and it is to cover that possession that the plea is put in. Consider the case, where the title to the land is attached. If a Court of Equity was to make him discover, how he made out his title to the land, of which he is in possession, there would be no conscience, no equity, no good discretion even, to enable the Court to call upon the Defendant, having paid money for the land without any notice, a title perfectly founded in conscience, if it has any foundation, to set forth his title. The deeds are incident to the possession. Even where the Defendant is in possession of the land, the plea will not go to the extent, to which it is attempted now to carry it; for though the Court would not call upon him to set out, by what means he derives his title, yet there are cases, where the Court would have no hesitation to make him describe the thing, of which he is in possession. If a mortgage was made by the owner of an estate partly settled, partly unsettled, and during the possession of that owner the boundaries had been confounded; if a person entitled under the settlement filed a bill to compel the mortgagee to set out, not the title, by which he claims, but the metes and bounds of the estate, subject to his mortgage, no such plea could go to the extent, this Defendant supposes. This Defendant is not called upon to discover any part of her title, but only to describe what these deeds are, which are relative to the Plaintiff's estate, and in consequence of the mortgage have got into her possession. I have stated, that the title-deeds are incident to the possession. *Prima facie* a person in possession of the estate under a title, that gives a freehold interest at the least, has a right to the custody of them. They are not considered in law as chattels; but follow and are incident to the estate in the hands of * the owner. At law they belong of right to the owner; [* 226] and do not go to the executor. As by the law the Defendant could not hold them, it is against all conscience to refuse to describe that, which the other party by the admission of the Defendant has a right to recover. It by no means follows, that every species of deed, that may be in her possession, should be directed by this Court to be delivered up: but it would be extremely pernicious to permit her to close her mouth and to refuse any account whatsoever. Suppose counterparts of leases were delivered to her: they are of no value except to the actual owner; not of so much value as a clean skin of parchment: so surveys, maps, rent-rolls of a manor: they are of no intrinsic value: they are of value to the owner of the estate, of which they are the muniments, and the enjoyment of which is carried on by means of them.

Then it comes to this: the assumption must be, that she has a right to the deeds as a substantive property; that is, as chattels. Where is the difference between this and the common case of goods, for which trover or detinue lies? A person averring, that he is in

such circumstances, that he cannot describe them, requires an account to be given to enable him to do so. Suppose, a box of jewels was pledged by a person not the owner, but a mere bailee, the pawnee supposing the person in possession actually the true owner, and there being no reason to think otherwise: there would be no difficulty in a Court of Equity in obliging him to explain and set out that property, of which he admits the title to be in another, only claiming the value, for which it was pledged; a description, that will make it the subject of an action at law (1). It is remarkable, and I do not blame the pleadings for it, that though, where the Defendant is in possession of the lands, he must state, that he made the purchase from a person in actual seisin and possession under a title of ownership, and it is so stated in this plea, as to the land, it is not so stated as to the title-deeds; for the language is, that he had the *disposal* of them: so would a carrier: so a mere bailee. That is not a statement, that he was the owner; nor could it be so stated with truth and good conscience; for a tenant for life cannot be said to have the ownership of the deeds. It is a relative ownership, as incident to the title of the land. The title and ownership are in the Plaintiff. The right is claimed, not as a personal chattel, but as a right incident to this mortgage; and she is attempting to put the Plaintiff under a disadvantage by retaining that, with regard to which she can have do profit.

It was pressed in the argument, and ought to be considered, [*227] what these title deeds may be. If there are none, of which the Defendant can make any advantage, she is without any beneficial interest or profit to herself retaining what may be a profit and advantage to the Plaintiff. But there may be among them a term, which may either be attendant upon the inheritance, as a satisfied term, or a term amounting to a freehold, of which she may make advantage. If a satisfied term, it would be absurd to let it remain in the hands of the Defendant; for the only effect would be to leave to the Defendant what could be of no advantage to her, but only a vexation to the Plaintiff (2); for if she attempted to avail herself of it improperly, though that might not appear to a Court of Law, it would appear to this Court; and this Court would interfere to prevent that improper use of it. On the other hand, if it amounted to an estate of freehold, that would enable her to get possession, I do not know, that this Court could compel her to deliver up that. Till the discovery is made, it is impossible to know, whether any relief can be given; therefore the proper order will be, that the plea shall be over-ruled as to the discovery, and shall stand for an answer with liberty to except (3).

1. IN order to support a plea of purchase for valuable consideration, it seems not to be necessary, that the defendant should be in possession of that which he seeks by the plea to protect; see, *ante*, note 4, to *Jerrard v. Saunders*, 2 V. 187.

(1) See *Hoare v. Parker*, 1 Bro. C. C. 578, *contra*.

(2) See Lord Eldon's observations in opposition to this, *post*, vol. ix. 30, 31.

(3) See *Walwyn v. Lee*, over-ruling this case, *post*, vol. ix. 24.

2. The only ground upon which Courts of Equity grant relief, with respect to confusion of boundaries, is, that the defendant, or those under whom he claims, had a duty imposed upon them to keep the subjects distinct. *Grierson v. Eyre*, 9 Ves. 345; *Duke of Leeds v. Earl of Strafford*, 4 Ves. 185; *Aston v. Lord Exeter*, 5 Ves. 293. Some equity must have been superinduced by the acts of the parties, or the Court of Chancery has not jurisdiction to settle the boundaries of legal estate. *Wake v. Conyers*, 2 Cox, 362; *Atkyns v. Hatton*, 2 Anstr. 286; *Speer v. Crauter*, 2 Meriv. 417; *Willis v. Parkinson*, 1 Swanst. 9; *Attorney General v. Fullarton*, 2 V. & B. 265. Unless some such foundation is laid for a commission to ascertain boundaries, it will not be issued, except by consent. *Miller v. Warmington*, 1 Jac. & Walk. 492; *Speer v. Crauter*, *ubi supra*.

3. That the pawnee of a bailee, or factor, must give such a discovery as will enable the owner to bring an action, see *Marsden v. Panshall*, 1 Vern. 407.

4. With respect to the party who is entitled to the custody of title deeds, see note 1, to *Ford v. Peering*, 1 V. 72.

CROMMELIN v. CROMMELIN.

[1796, JULY 19, 22.]

CONDITION by will, requiring consent of trustees to marriage, not applicable to the second marriage of a natural daughter, who had married between the date of the will and the death of the testator, having approved it, and was a widow at his death. (a)

SIR ROBERT BARKER by his will, dated the 22d of January, 1788, devised and bequeathed all the residue of his estate and effects to his executors upon trust to convert the whole into money, and to stand possessed upon trust for his natural daughters, Mary, Juliana, and Hannah Barker, equally; one moiety to be paid, when they should respectively attain the age of twenty-four, or be married with the consent and approbation of his said trustees or the survivors in writing, which should first happen: but if any should marry without such consent under twenty-four, such moiety to be paid to her or their husband or husbands at her or their attainment of twenty-four, or when she or they, if living, would have attained that age, or to the executors, &c. of such husband or husbands; and the other moiety to be paid to his said daughters respectively, when they should attain twenty-eight, or be married with such consent and approbation as aforesaid. But in case any of his said daughters should marry before the age of * twenty-eight without such [* 228] consent, then as to a moiety of her or their share or shares upon trust for her or their separate use for life; and after the death of such daughter or daughters for her or their children; and if there should be none, for the other daughter or daughters and her or their children, subject to the same restrictions with regard to their marrying, and upon the same trusts as the original shares; and in case all his said daughters should marry without such consent and die without

(a) As to conditions in restraint of marriage, see *ante*, p. 89, note (a) to *Stackpole v. Beaumont*.

children, then as to all the said moieties in trust for his next of kin : provided that if any of his said daughters should marry under twenty-one with such consent, it should be lawful to the trustees to pay one moiety of her share to the husband, or to make a settlement ; and if any should die before twenty-four or marriage, the whole of her or their share or shares, and if after twenty-four and before twenty-eight or marriage, the remaining moiety or moieties, should go to the survivors equally, or the survivor, their or her executors, &c. to be paid at the same time, subject to the same restrictions with regard to their marrying, and upon the same trusts in case of marriage without such consent as aforesaid, as the original shares ; and in case all his daughters should die, before they should have respectively attained the age of twenty-eight, or be married after twenty-four with such consent, so that the whole or part of the said residue should not be absolutely disposed of, then in trust for his next of kin.

The will contained a direction for the maintenance and education of his said daughters out of the dividends and interest, till their portions should be payable.

The testator executed a codicil on the 7th of May, 1789, confirming the will, except so far as it was thereby altered, and making no alteration in the disposition of the residue. On the 14th of September, 1789, he died. The following facts appeared upon the Master's report ; Mary Barker died in the life of the testator under the age of twenty-four and unmarried. Juliana upon the 17th of December, 1788, being under the age of twenty-four, married John Shipton in the East Indies, with the approbation of Mr. Cockerell, who was one of the trustees under the will. Her father on being apprised of that marriage approved it. On the 1st of March, 1790, Shipton being dead, she married the Plaintiff Crommelin in Bengal in the presence of and with the consent of Mr Cockerell. Hannah married Mr. Webb without consent ; who proposed to [* 229] settle a moiety of her share upon her and the * children according to the will ; and that the other moiety, subject to some charges, should, if not exceeding 10,000*l.*, be paid to him, and if it should exceed that sum, the excess should be settled.

Mr. Webb's proposal was approved by the Court.

It was contended, that Mrs. Crommelin at the time of her second marriage was an object of the conditions in the will.

LORD CHANCELLOR [LOUGHBOROUGH]. Upon the first view of the case, as I think the directions given as to Mrs. Webb's share perfectly proper, I was very much inclined to have given the same as to Mrs. Crommelin's ; thinking it exactly what Mr. Crommelin ought to have done himself, viz. to have taken one moiety, and to have settled the other upon the children. But upon considering the will and the circumstances, I think I cannot make such a decree, that Mr. Crommelin shall take it in that manner ; but he is entitled to the whole. There is no end of conjecturing, what the will would have been in this or that event. That is not an agreeable mode for

the Court to speculate in any case. In this the testator has been most unfortunate ; for in the manner of framing a provision for these unmarried daughters, intending to promote a marriage with consent, he has given a premium upon a marriage without consent ; and exposed them to the danger he meant to prevent. What claim had Mrs. Shipton the day before she married Mr. Crommelin ? I take it for granted, there was no previous consultation with the testator upon the marriage with Shipton : but the report states, that it had the full approbation of Mr. Cockerell ; under whose care, I take it for granted, she was, as the friend of the testator and a relation. The codicil confirming the will executed after the marriage, is of but little consequence ; as I suppose, the testator did not then know it. The second marriage was also with the consent of Mr. Cockerell, before she could have known of the will. In the situation, in which she stood at the second marriage, the question is, whether she had any and what provision under the will. At the death of the testator she would have claimed the whole provision made for her as one of these three daughters, who were to share equally what he had given to them. Her claim would have been upon the ground, that *all these provisions [*230] were upon the supposition, that they were unmarried, and in order to provide suitable marriages for them. Her claim would have been, that she had married ; and that the consent of the trustees was quite impossible then ; for there were then no such trustees in being. It was in the life of the testator ; and I add the circumstance, that it was a dutiful, proper, respectful, marriage, with consent of Mr. Cockerell, the friend, to whom she was trusted, and had the sanction of the testator afterwards. Therefore she would say, "I claim it as a provision to be paid to a married daughter ; and I am totally out of the fetters of all these conditions. I am not under the description of daughters, who are objects of the condition." The difficulty upon that would have been very whimsical. If not entitled to this provision, she is entitled to nothing. The will being opened, found her, her husband being dead, in the condition of a woman *de facto* unmarried ; and therefore it is said, she might comply with the condition ; which might apply to a second marriage. There is nothing in the will to show, a second marriage was in the testator's contemplation ; for the first husband marrying without consent takes half, the other goes to the children, and in default of children, to the other daughters. But in a case extremely possible to have happened, and I may put probable cases, if Mrs. Shipton had two or three children, she would have said, she ought to have it to enable her to provide for them. The answer, supposing the condition bound her, would have been "No : you are not entitled : you are not twenty-four : you will be maintained." She would ask, how she could make a provision for the children. The answer would be, by marrying a second husband. It would be the absurdest of all constructions, that a will intended to provide for a marriage and enable the wife to provide for the children must by

these conditions, so inapplicable to the case of a daughter married and having children, compel her to marry again for the sake of the children by the first marriage. That would be so whimsical, that it fortifies the conclusion, I draw, that the condition does not regard the case of a daughter actually married in the life of the testator, and does not bind her; especially as upon the circumstances it could not be his intention to leave her totally unprovided for, because she had done, what it was his object that she should [* 231] *do, married with proper advice and discretion. She had the consent of Mr. Cockerell, who happened to be one of the trustees in the will, whose consent was made necessary. I do not however rest upon that circumstance; as it was not known; but I determine upon this; that having married and being then a widow she was not intended to be subject to the conditions. The consequence is, that it will go to Mr. Crommelin (1).

1. As a general rule, a testator must never be supposed to have meant more than he has expressed; and that no implied case must be added, where the implication is not absolutely necessary to render his whole will consistent; see, *ante*, note 4, to *Blake v. Bunbury*, 1 V. 194.

2. That a condition, annexed to a legacy, requiring consent to the marriage of the legatee, is satisfied when such legatee is once married with the consent prescribed; and that the condition will not, unless expressly so declared, be construed as applicable to a second marriage of the same party; see *Hutcheson v. Hammond*, 3 Brown, 145; *Clarke v. Berkeley*, 2 Vern. 721. The principle was recognized in *Parnell v. Lyon*, 1 V. & B. 484, in *Smith v. Cowdery*, 2 Sim. & Stu. 363, and in *Wheeler v. Warner*, 1 Sim. & Stu. 310.

MAITLAND v. ADAIR.

[1796, JULY 22.]

"I RETURN A. his bond" in a will is not a release, but a legacy; and having lapsed, the bond remains in force against a surviving co-obligor. (a)

Residue bequeathed to relations in the proportion the testator had given the other part of his fortune: pecuniary legatees only are entitled: not a devisee of real estate, [p. 231.]

Bequest to relations does not include those by marriage, (b) [p. 231.]

WILL of John Adair: "I devise to my brother, the Rev. Mr. Adair, 2000*l*. I also return him his bond for 400*l*., with interest due thereon, which he owes me." The testator gave to his nephew

(1) *Stackpole v. Beaumont*, *ante*, 89, and the references in the note, p. 98.

(a) 2 Williams, Executors, 870, 871; *Atty Gen. v. Holbrook*, 3 Y. & J. 114; S. C. 12 Price, 407.

(b) As to who are entitled in a will, under the description of "relations." 2 Williams, Exec. 812-815; of "poor relations." *Ibid* 813; *M'Neilledge v. Galbraith*, 8 S. & R. 43; *M'Neilledge v. Barclay*, 11 S. & R. 103; of "nearest relations;" 2 Williams, Ex. 814. No person can regularly answer the description of "relations," but those who are akin to the testator by blood; consequently relations by marriage are not included in a bequest to "relations" generally. *Ib*.

Thomas Adair, son of his said brother, his estate at Tregar in Brecknockshire, to him and his heirs for ever, with the rents due at his death. He gave a great number of pecuniary legacies, most of which were given to relations; namely, sisters, nephews, nieces, and their children, and to his brother-in-law, James Hannah, 500*l*. He gave to Mr. Hodgson, where he lodged, all his wines and rum. He gave a picture to another person, and some other specific articles to his executors; and he added, that to prevent trouble he bequeathed all his clothes and other effects in his lodgings at his death to his nephew Thomas Adair. By a codicil giving rings to several persons he proceeded thus: "My will and intention is, that whatever money, over and above what I have already bequeathed, I may be possessed of at my death, may be divided among my said relations by my executors in the proportion I have bequeathed the other part of my fortune."

It appeared by the Master's report, that the bond mentioned in the will was a joint bond in the Scotch form by the testator's brother and his son. The questions were, 1st, whether the disposition of the bond by the will amounted to a release, or was only a legacy, and therefore lapsed by the death of the testator's brother in his life, and remaining in force against Thomas Adair, the co-obligor and executor of his father: 2dly, whether the nephew was entitled to a share of the residue, in respect of the value of the Tregar estate: 3dly, whether James Hannah, the brother-in-law of the testator, was entitled to a share of the residue.

Lord CHANCELLOR [LOUGHBOROUGH]. There is not [232] the least doubt as to the bond. It is distinctly a legacy to the brother. The inquiry directed, whether it remained in the custody of Mr. Adair, shows, what the Court thought at the hearing. There is no foundation therefore for Thomas Adair to have the bond delivered up.

The other two questions are as clear. The word "fortune" in the will must mean money legacies; and as to the third question, I take it, that where a person gives among his relations, those by affinity are not included.

1. If a testator, by his will, direct a bond to be given up to the obligor, the words of the testator do not amount to a release of the bond debt; they are legatory only; and if the obligor should die in the life-time of the testator the legacy would lapse, and the securities remain in force. *Izon v. Butler*, 2 Price, 40; *Tophis v. Baker*, 2 Cox, 118; *Elliott v. Davenport*, 1 P. Wms. 84. But, where there is nothing *personal* in the direction that a bond should be given up, and the intention of the testator appears to have been that, in all events, the bond should be cancelled, the representatives of the obligor may have the benefit of the discharge of the debt; *Sibthorp v. Moxom*, 3 Atk. 580; for a gift of a legacy may certainly be so framed as to be a release of a demand; but, to have that effect, the intent must be quite clear: *Wilmot v. Woodhouse*, 4 Brown, 230: the propriety of admitting evidence *dehors* the will, to prove that intent is not so clear, see the note to *Eden v. Smyth*, 5 V. 341.

3. When the execution of a testator's directions devolves upon the Court, a bequest to "relations," is usually confined to the next of kin, according to the Statute of Distributions; *Cruyys v. Colman*, 9 Ves. 324; but, where a power of

distribution is given to a trustee, he may, if he thinks fit, under the term "relations," include persons not being the testator's next of kin. *Brown v. Higgs*, 5 Ves. 502, citing *Harding v. Glyn*; see, also, *Wright v. Atkins*, 19 Ves. 302, and *Walter v. Maunde*, 19 Ves. 426. Of course, where a legacy is given to the testator's relations by blood or marriage, parties connected by affinity are included. *Devisme v. Mellish*, 5 Ves. 529.

EMERY v. ENGLAND.

[1796, JULY 22.]

BEQUEST to the youngest child of A. if she should have any child or children within a certain period; if no child or children within that period, over: her eldest child, being the only one within the period described, is entitled. (a)

JOHN ENGLAND by his will gave to his brother Joseph England and his sister Sarah England all his effects, subject to his debts, should his sister Mary Taylor have no child or children at the time of his decease or in the space of twelve calendar months after: but should she have any child or children at his decease or in twelve calendar months after, he gave one third of his property to the youngest of her children within the time above mentioned; the other two thirds to be divided between Joseph and Sarah: should either Joseph or Sarah be dead at his decease, the survivor to receive the other third, unless Sarah should have a child or children; then her third to go to the youngest child: otherwise to her: should Joseph be dead at his decease, his third to be divided between Sarah or her youngest child and Mary Taylor's younger child.

The testator died in March, 1786. John Taylor was the only child of Mary Taylor then living. Her next child was born on the 19th of April, 1787: and she had more afterwards. The bill was filed by the executor.

LORD CHANCELLOR, [LOUGHBOROUGH], without argument was clearly of opinion that the Defendant John Taylor was entitled to one third, and decreed accordingly (1).

WHEN a testator has specified a time at which the vesting of his bounty shall be determined, the person who at that time answers his description will take, though others may possibly come in *esse*, who, if they had been born in time, would have been preferred; see, *ante*, note 3, to *Roebuck v. Dean*, 2 V. 265, and note 3, to *Hill v. Chapman*, 1 V. 405. As to the latitude with which the "younger children" may be construed, see, *post*, note 1, to *Lady Lincoln v. Pelham*, 10 V. 166.

(a) In Equity every child but the heir is considered as a younger child; and therefore, an eldest daughter, destitute of a provision, has been considered a younger child, to answer the general intention, though not falling literally within the description. *Beale v. Beale*, 1 P. Wms. 244; *Hall v. Luckup*, 4 Sim. 5. Upon the same principle an eldest son will be enabled to claim a portion as a younger child, when the family estate is given from him, or he is otherwise unprovided for. 2 Williams, Exec. 801. This, of course, proceeds upon the idea of the right of primogeniture, which happily does not prevail in the United States.

(1) *Duke v. Doidge*, 2 Ves. 203.

WAKEMAN v. THE DUCHESS OF RUTLAND.

[1796, JULY 27.]

BILL by devisees in trust to sell for specific performance of an agreement to purchase: exception to the report in favor of the title, that the persons entitled to the purchase money, subject to debts, legacies and other charges, were not parties to the suit: the Lord Chancellor was of opinion, they ought not to be parties to the conveyance; and if they were, their covenant ought to extend only to their own acts and those of the devisor; not to a general warranty, without a special contract for it: but, as the point must come properly upon objections to the conveyance, the exception was overruled upon the form. (a)

Bill by devisees in trust to sell for specific performance of an agreement to purchase: that the heir of the devisor is not a party to the suit is not matter of exception to the report in favor of the title, [p. 234.]

No equity upon eviction to recover purchase-money, [p. 235.]

THOMAS EYRE devised all his lands and hereditaments at Eastwell, Leicestershire, to William Wakeman and Vincent Eyre, their heirs and assigns, upon trust to sell, and to apply the produce and the interest thereof and the rents and profits until the sale, towards payment of such of his debts and legacies as his personal estate, not specifically bequeathed, and the moneys to arise from other sales of real and personal property, thereby directed to be sold, might be deficient to satisfy; and to apply the interest of the surplus in discharge of certain annuities and any other annuities the testator might leave by codicil; and to pay the remainder of the interest to his wife for life; and after her decease to divide the interest into five shares, and pay the same to his cousins James Eyre, Charles Eyre, and Mary Eyre, namely, two fifths to James, two fifths to Charles, and one fifth to Mary, for their respective lives; with remainders to their issue respectively and survivorship for want of issue, as therein directed. The testator directed, that the receipt or receipts of the person or persons, empowered to sell the said estate, should be a sufficient discharge for so much of the purchase-money, as should be expressed in such receipt or receipts to have been by him or them received; and that no purchaser should be deemed to be answerable for the application of the purchase-money.

The bill was filed by the trustees for specific performance of an agreement to sell the devised estates for 36,000*l*. Exceptions were taken by the Defendants, the Duke of Rutland, an infant, and the Duchess of Rutland, the Duke of Beaufort, and the Right Honora-

(a) See 1 Maddock Ch. 605; 1 Sugden, Vendors, 110 (6th Amer. from 10th Lond. ed.) Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, and the residue is given over, a purchaser is not entitled to any covenants for the title; the title can be made only by the trustees for sale, without calling in the parties who are presumptively beneficially interested. But, it has been said by Sir Edward Sugden, that it is to be lamented that here the rule of Chancery differs from the practice of the Profession: for it always has been, and still is, the practice of the Profession, to make all the *cestuis que trust*, whose shares of the purchase-money are in anywise considerable, join in covenants for the title, according to their respective interests. 2 Ibid. 453.

ble William Pitt, executors of the late Duke of Rutland and guardians of the infant Duke, to the Master's report in favor of the title. The first exception was upon the ground, that the heir at law was not a party to the suit : but he afterwards agreed to become a party. The second exception was, that the devisees of the money to arise from the sale were not parties to the suit ; though they have such an interest in the said devised estates, that a good title cannot be made without them, and without their joining in the conveyance and entering into the usual covenants for the title, and the safety and indemnity of the purchaser ; which are the more necessary in this case, as several material defects appear in the title from time to time ; which are only attempted to be removed by non-claim and supposed possession ; particularly a recovery in 1709 of part of the devised estates, in which recovery there appears by the abstract to have been no sufficient tenant to the *præcipe*, and also a conveyance in 1751, which by the abstract appears to be a conveyance by one Catholic to another, and founded upon the will of a Catholic. The following covenant in the draft of the conveyance was objected to on the part of those, to whom the surplus of the produce of the sale was given by the will ; " And the said Lady Mary Eyre, James Eyre, Charles Eyre, and Mary Eyre, severally and respectively for themselves and their several and respective heirs, executors, and administrators, do hereby, as far as they are respectively [* 234] benefited under the said will, covenant *and agree, that notwithstanding any matter or thing whatsoever by the said Thomas Eyre, the testator, or any of his ancestors, or any person lawfully claiming from, by, under, or in trust for, him, them, or any of them, committed, the said trustees are lawfully seised of an absolute and indefeasible estate of inheritance."

Mr. *Graham* and Mr. *Sutton* for the exception, cited *Lloyd v. Griffiths*, 3 Atk. 264. (4 Cruise Dig. 93.)

Attorney General [Sir *John Scott*] and Mr. *Mansfield*, for the Report. There is the same right to call upon the simple-contract creditors and the legatees. Perhaps they may take the bulk of this fund ; and the residue may not be 50*l*. For ayes it has not been thought reasonable, that every conveyance should import a warranty ; and the very reason of introducing covenants was to cut down the effect of those words, that were supposed to import a warranty. One effect of this covenant would be, that the purchaser might 150 years hence file a bill for a discovery and account to enable him to bring an action. In sales under the Crown there is no covenant. In sales by assignees of bankrupts the creditors do not covenant. I cannot see the principle of *Lloyd v. Griffiths*. It cannot depend upon the principle, on which it is put, the *quantum*, the person takes. Lord Hardwicke was struck by the circumstance, that Mrs. Webb was to take a defined sum, almost the whole of the money. It was a sort of compromise for a middle act. It is no decision, that a covenant could be required even against the acts of the devisor : but it is a decision, that nothing more could be required.

LORD CHANCELLOR [LOUGHBOROUGH]. I must have over-ruled the first exception; for it is no exception to the report of a good title (1).

This point comes very awkwardly before me; for I am bound to over-rule the exception; and then I do not decide the question; for it is still open to objections to the conveyance, when settled by the Master. Upon the form I cannot allow this exception; and I have gone by anticipation into the argument; wishing to see, what will be the ground of objection, when it comes properly to be discussed here. The scope of the exception is, that these persons are not made parties to the suit. That comes a *great [*235] deal too late in the cause; and was an objection to be made at the hearing. It then supports itself by certain hints of objections, which are not made a substantive ground of exception. I cannot allow this without laying down as a general proposition, that all persons interested in the money to arise from the sale ought to be parties to the contract.

The exception does not specifically state, what the covenant is, that they are to enter into. That covenant ought to have appeared: but then the exception would have destroyed itself; for *non constat*, what covenants or what parties the Master will think necessary. But upon the argument the great stress is, that they ought to have such a covenant as does amount to a warranty of the title notwithstanding any act by Mr. Eyre or his ancestors; which is in effect a general warranty; though binding themselves no farther than the amount of their interests. If such a covenant is not a demand of right, I think, the question will never arise; for if the parties could not get that covenant, they would not suffer the devisees of the money to arise by sale of the estate to touch the conveyance, where they are only to covenant against their own acts, which they could not do, or the acts of the person, from whom they claim; for it is not merely adding a party; but it is adding a party, with whom any connection would be inconvenient. The prudence of the common clause, that the receipt of the trustees shall be a discharge to the purchaser, would be defeated; and he would take upon himself the knowledge of all the trusts of the will. (a). In the case cited it is quite clear, that Mr. Booth's opinion was over-ruled by Lord Hardwicke; and it ended in a compromise: Mrs. Webb made no objection to join in the covenant: the dispute was, what the extent of it should be: Lord Hardwicke split the difference between them, and adds to it, that the deviser had done no acts, considering her as entitled to the greater part of the money.

As to the extent of the covenant, there was a case (2) about three

(1) *Post*, vol. xix. 673. Sugden's Vendors and Purchasers, 308, 5th edit.

(a) If this be so, conveyances in England are said to be reprehensible; but as the purchaser buys under the will, whether the *cestuis que trust* are or are not parties to the conveyance, he is equally affected with knowledge of the trust. 2 Sugden, Vendors, 454.

(2) *Urmston v. Pate*, in Chancery, 1st of November, 1794; 4 Cruise's Dig. 90.

as aforesaid, should go and be paid to her nephew John Bundy, and in case of his death to such child or children of John Bundy as should then be living; to be equally divided between them, if more than one; and in case any child or children should be then dead, leaving a child or children, such child or children to take the parent's share.

The two grandsons were the children of a deceased son of the testatrix: the grand-daughter was the child of a deceased daughter. At the date of the will they were all very young: the grand-daughter was the youngest. They were the next of kin of the testatrix at her death. Both the grandsons died under the age of twenty-one. The bill was filed by the personal representative of George Snowden, the survivor, praying to be declared entitled to two thirds of the residue of the personal estate of the testatrix in the event of Catherine Winter's attaining twenty-one or marrying; and to have the accounts taken and the fund secured. The Defendant Bundy by his answer claimed the shares of the two grandsons; and he claimed the whole in the event of the death of Catherine Winter under twenty-one and unmarried. She attained twenty-one a few days after the cause was heard at the Rolls.

MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN]. This case has stood for some time; and I have been much pressed for my opinion. The will is one of the most complicated as to the intention, that ever came before the Court. It is hardly possible to suppose, the testatrix could have intended, that in the event, that has happened, the shares of the grandsons should become a vested interest in the survivor of them; and yet upon full consideration I do not feel myself justified in declaring otherwise. No doubt, the first clause gave them a vested interest as tenants in common; and the time of payment was not annexed to the substance of the gift. In the subsequent provision it is hardly possible to suppose, she did not intend, that in case of the death of the two grandsons under twenty-one their shares should go to the grand-daughter and *vice versa*. But she has not added that: giving the share of either grandson, dying under twenty-one, to the survivor, she stops short; and then she has only provided for the case of the death of all three, not that in the event of the death of the two grandsons under twenty-one their share should go to the grand-daughter; which there can be no doubt she intended. The question is, whether the Court can supply that clause, which one cannot but believe was omitted by mistake, in favor of the grand-daughter. As she has attained twenty-one, the gift over cannot take place. I have had a great desire to supply the defect. It is almost impossible to suppose, she must not have intended it: but upon full consideration, thinking it much safer in the determinations of Courts of Justice not to indulge in speculations as to the intention, and after *Denn v. Bagshaw*, 6 Term Rep. B. R. 512, I feel myself in the situation of the Court of King's Bench there, where it was not possible to doubt the intention: but the Court said, as I now say, that I feel myself not authorized to supply the defect,

which I cannot but believe exists in this will. I am to look, whether the interest, that vested in the survivor of the grandsons, is taken away. It is not. It is left in full effect, being given away only in an event, that has not happened. Therefore declare the Plaintiff entitled to two thirds, and Catherine Winter to one third (1).

1. In *Harrison v. Foreman*, 5 Ves. 209, Lord Alvanley, adverting to the case of *Mackell v. Winter*, observed, that the expression attributed to him in the report, namely, that "it was hardly possible the testatrix could have intended the shares of grand-sons should become a vested interest in the survivor of them," was too strong. Lord Alvanley, however, thought himself bound to make that construction, and (notwithstanding the reversal of his decree by Lord Rosslyn) appears to have adhered to his first opinion: see *Booth v. Booth*, 4 Ves. 403, and *Beaman v. Stock*, 2 Ball & Bea. 414.

2. As to the distinction between a gift of a legacy "attwenty-one," and a legacy "payable at twenty-one," see, *ante*, note 5, to *Crickett v. Dolby*, 3 V. 10, and note 4, to *Stackpole v. Beaumont*, 3 V. 89.

3. Merely postponing the payment of a legacy, does not prevent the legacy from vesting, *Hixon v. Oliver*, 13 Ves. 113; *Blamire v. Geldart*, 16 Ves. 316, and the Court always inclines to construe a residuary bequest so as to prevent an intestacy. *Leake v. Robinson*, 2 Meriv. 386; *Phillips v. Chamberlayne*, 4 Ves. 59; see, also, note 3, to *Perry v. Woods*, 3 V. 204.

ELTON, *Ex parte*.

[1796, MARCH 21, 22; JULY 28.]

UPON petition of joint creditors to be admitted to prove under a separate commission it was ordered, that they shall be admitted; but not to receive a dividend; and that the dividend shall be reserved, till an account is taken of what they have or might have received from the partnership effects. (a)

Joint creditor a good petitioning creditor under a separate commission, [p. 239.]

Commission of bankruptcy is not now treated as an execution at law; for the distribution is equitable, [p. 239.]

Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors: each estate is applicable to its own debts, (b) [p. 240.]

In bankruptcy the usual directions are to apply the funds respectively; the joint to the joint debts, the separate to the separate debts, the surplus of each to the creditors remaining on the other, [p. 241.]

WILLIAM FRY and others carried on business in partnership as cotton manufacturers under the firm of William Fry and the Rawleigh Company. In July, 1792, in consideration of 1000*l.* paid by the petitioners to William Overend, one of the Rawleigh Company, a bill of exchange for that sum was duly endorsed to the petitioners. The bill was dated the 9th of July, 1792, and was drawn upon Fry and his partners, and accepted thus in the hand-writing of Fry: "Accepted, W. Fry and Rawleigh Company." In May, 1793, a separate commission of bankruptcy issued against Fry as distiller, dealer

(1) Upon appeal to the Lord Chancellor this decree was reversed: *post*, 536.

(a) See Story, Partnership, § 379.

(b) Story, Partnership, §§ 365, 377, 379.

and chapman. • The bill not being paid upon applications to the Rawleigh Company, the drawers, and the indorsers, the petitioners attempted to prove the debt for the purpose of receiving a dividend under the commission. The commissioners reserved a dividend upon the claim, in order that the opinion of the Lord Chancellor might be taken.

The opposite cases upon this point, which are collected 1 Cooke's B. L. were cited (1).

Lord CHANCELLOR [LOUGHBOROUGH]. This petition seems to me to be a matter under very pressing circumstances. I do not mean to decide it now; for upon considering what has been stated and looking into the cases collected by Mr. Cooke it appears to have been understood for some time, that a joint creditor is entitled to prove and receive a dividend from the separate estate. At the same time I understand from the Attorney General that he does not think that settled as matter of law, but of convenience, and subject to this limitation; that if the assignees of the separate estate think fit or will undertake to file a bill, the creditor admitted to prove is to be restrained from receiving a dividend. If it stands so, it is an order, that can only be made here in this Court: it is impossible for the commissioners either in town or country to admit, as this

[* 239] petition supposes, a joint creditor to take a dividend * under the separate commission; for they have no authority; it is impossible they can decide of themselves; for an option to be given to assignees is a thing, that can only be done by an order here: the commissioners have no power to do it. The consequence therefore in every such case, is, that there must be a petition. There is another inconvenience, if the matter remains, as it now stands: one set of commissioners acting upon the authority of the first edition of Mr. Cooke's book would certainly refuse the claim; another set acting upon the second edition would certainly admit it. It stands therefore in a situation, in which commissioners would find great difficulty how to act. It has been understood for a considerable time according to Mr. Cooke, that there is no difficulty in the Court's directing the commissioners to receive the proof of the joint debt. Antecedent to these authorities I should have thought it perfectly clear, it could not be done; and that the utmost length, they could go, was, that a joint creditor, where there is a separate commission, is to be admitted to prove only for the purpose of assenting to or dissenting from the certificate, and receiving such surplus beyond the amount of the separate debts, as joint creditors would be entitled to claim, where there are two commissioners. I doubt, whether it is possible to innovate upon that, which was the law formerly; for though a commission is an execution, and the joint creditor has such an interest as enables him to take out a separate commission, yet the consequence does not follow. There are cases antecedent to those cited. In Lord King's time it was determined, that a joint creditor

(1) 7th Edit. by Mr. Root, 244, &c.; 8th Edit. 259, &c.

might be a good petitioning creditor, though the commission is only against one partner ; that the joint creditor does no more in taking his execution, passing over his action, than bringing the separate effects to be administered in bankruptcy. But it is not treated any longer as an execution at law ; for the effects taken under it are not disposed of as at law, but fall immediately by the direction of the statute under the administration of this Court ; which is to make an equitable distribution among the creditors, to admit all equitable claims upon the effects, and to divide them rateably. It has been long settled, and it is not possible to alter that, that each estate is to pay its own creditors.

With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution he has taken out. He is precluded from suing at law ; and it would be against all Equity, having done it for their benefit, to refuse him the fruit of that for his own debt. * But any [* 240] other joint creditor is in exactly the case of a person having two funds ; and this Court will not allow him to attach himself upon one fund to the prejudice of those who have no other, and to neglect the other fund. He has the law open to him : but if he comes to claim a distribution, the first consideration is, what is that fund, from which he seeks it. It is the separate estate ; which is particularly attached to the separate creditors. Upon the supposition, that there is a joint estate, the answer is " apply yourself to that : you have a right to come upon it ; the separate creditors have not ; therefore do not affect the fund attached to them, till you have obtained what you can get from the joint fund." There would be no great inconvenience, if he could put them in his situation as to the joint fund : but I doubt very much, whether that is possible ; for suppose in the case of A. and B., partners, the former remains solvent, the latter becomes a bankrupt, and there is a joint debt of 1000*l*. The creditor making his claim first against the separate estate, paying a dividend of 10*s*. in the pound, receives 500*l*. Can the assignees claim against the solvent partner what they have paid ? His answer would be they could only claim the same right the bankrupt could ; and as against the bankrupt he is entitled to retain : he has paid his moiety of the partnership debt. If the case is turned the other way, and the creditor first sues the solvent partner, he recovers all the debt against him ; and he has a right to come in as a separate creditor of the bankrupt to the amount only of a moiety of that debt ; for a moiety only of the debt of the partnership he could have recovered against him, if he had been solvent. That makes a very great difference to the separate creditors. I was led to consider another thing : is it possible to admit a separate creditor to take a dividend upon the joint estate rateably with the joint creditors ? No case has gone to that ; and it is impossible ; for the separate creditor at law has no right to sue the other partner. He has no right to attach the partnership property. He could only attach the interest, his debtor had in that property. If it stands as a rule

of law, we must consider, what I have always understood to be settled by a vast variety of cases, not only in bankruptcy but upon general Equity, that the joint estate is applicable to partnership debts, the separate estate to the separate debts. Another difficulty is, whether really it is just to put it to the assignees in behalf of the separate creditors to assert the right of the creditor making [*241] the claim, to go against the joint estate. * The creditor coming in upon the separate estate is first to answer the question, why he does not go against the joint estate. It may be said, "the law is open to you; it is not open to us. You put us to file a bill against the other partners to discover and apply the partnership fund. You have a much quicker remedy; sue the partnership. You need not wait the account. They will settle it rather than put you to that; at all events you have a legal execution against them." Another consideration is, that the great object of the law in establishing this sort of authority, in which I now sit, is to make a speedy distribution and to avoid suits. The necessary consequence of admitting a joint creditor to prove against the separate estate is in every such case to make a Chancery suit; and the right of the separate creditors to the administration of their fund is frustrated.

I throw out this, desiring extremely to have the assistance of the Bar, and of those who are peculiarly conversant with the subject, to point out the balance of convenience and inconvenience; whether it is right to adhere to what is the rule according to the last determination, or to reconsider and recast the whole. There is nothing so inconvenient as leaving a point, that must so frequently occur, to any ambiguity. It cannot remain, as it now stands. If it is a petition, of course it is under singular circumstances; for there is nothing purely of course to be done by petition to me, that I cannot by a general rule direct the commissioners to do: I doubt, that is impossible here; for they could not put that guard upon it, that it should not be a general order, but that the assignees might stop him from receiving a dividend, till they had taken out of the joint estate what he should draw from the separate estate. Wherever my order will procure an account of the joint estate, there can be no harm; for then I should give the usual directions to apply the funds respectively, the joint estate to the joint debts, the separate to the separate debts; the surplus of each to come in reciprocally to the creditors remaining upon the other. But unless I can do that, every order, I can make, to let a joint creditor receive a dividend from the separate estate would carry a Chancery suit in the bosom of it, to have the joint estate brought into the fund, to prevent the separate estate from being exhausted; and I should make the order, and in the course of ten days suspend it by preventing him from receiving the dividend.

Let it stand over; and if it is possible to bring it on in the course of these petitions, I should be extremely glad to have it very fully discussed.

July 28. *Attorney General* [Sir John Scott], for the Petition, proceeding to argue upon the cases, that had been cited before, was stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. I am aware of all those cases: but the difficulty, that has struck me upon it, is, that what I order here to-day, sitting in bankruptcy, I shall forbid to-morrow sitting in Chancery; for it is quite of course to stop the dividend upon a bill filed. The plain rule of distribution is, that each estate shall bear its own debts. The Equity is so plain, that it is of course upon a bill filed. The object of a commission is to distribute the effects with the least expense. Every order I make to prove a joint debt upon the separate estate must produce a bill in Equity. It is not fundamentally a just distribution, nor a convenient distribution; because it tends to more litigation and more expense. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance. It is a contrivance to throw this upon the separate estate; for what hinders them from recovering at law this debt against the partnership; for it is money paid to one of the partners. They have nothing to do but to bring an action against the partners. The affairs of the partnership may be very much involved: but if they are arrested, they would pay it. It is not stated as a case, where there are no joint effects. Here it is only, that there are two funds. Their proper fund is the joint estate; and they must get as much as they can from that first. There is this singularity attending this case; that the whole transaction between them and Fry is a partnership transaction. The money was paid to one of the partners; most probably for the use of the partnership: the bill was drawn and accepted in the name of the partnership. I have no difficulty in ordering them to be admitted to prove; but not to receive a dividend. Will the assignees sue the partners in the name of the petitioners? It occurred to me, when this came on before, and no answer was given to it, that if the rule stands as you suppose, *there [*243] never would be a joint commission; but they would take out a separate commission against each partner.

The order was, that the petitioners shall be admitted, but not to receive a dividend; and that the dividend upon the proof shall be reserved, till an account is taken of what they have or might have received from the partnership effects (1).

1. THE rule, that a separate commission may issue on the petition of a joint creditor, was said, in *Ex parte Lavender*, 18 Ves. 19, to have been first introduced by the principal case; Lord Rosslyn, however, expressly founded his opinion as to this point upon the previous determination of Lord King. The doctrine is now established by positive enactment; see stat. 6 Geo. IV. c. 16, s. 16. But, though a

(1) *Post*, *Ex parte Abel*, vol. iv. 837; *Ex parte Clay*, vi. 813; *Ex parte Chandler*, *Ex parte Hall*, ix. 35, 349; *Ex parte Alcock*, xi. 603; *Ex parte Hubbard*, xiii. 424; *Ex parte Twitt*, xvi. 193, and the note, 194; *Ex parte De Tastet*, xvii. 247, 207, 8,

joint creditor may take out a separate commission, and even, as petitioning creditor, take dividends with the separate creditors; still, the petitioning creditor is the only joint creditor who is entitled to receive a dividend out of the separate estate, until the separate creditors are fully paid. *Ex parte De Tastet*, 17 Ves. 250. And see the 62d section of the statute just cited.

2. As to the mode of applying joint and separate estate, to the discharge of joint or separate demands; and to what extent a commission of bankruptcy may be considered as a species of execution, see, *ante*, notes 3, 4, and 5, to *Hankey v. Garret*, 1 V. 236, and note 5, to *Lyster v. Dolland*, 1 V. 431.

TURNER, *Ex parte*.

[1796, JULY 28.]

ACCOMMODATION bills upon the bankruptcy of the drawer were fully paid by the acceptors to the holder: who having a farther demand under the commission proved for the whole, including the bills; he may take out of the dividend upon the bills the proportion, he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged; the rest of the dividend on the bills belongs to the acceptor.

THE petitioner had lent his name by acceptance and indorsement for the accommodation of the bankrupt, who discounted the bills so accepted or indorsed with Snaith and Co. After the bankruptcy upon the application of Snaith and Co. the petitioner paid the full value of those bills, amounting to 815*l.* 15*s.* to them. They were creditors of the bankrupt to a much larger amount, and they proved their whole demand, including the amount of the bills received from the petitioner. The petitioner prayed, that Snaith and Co. might assign to the petitioner the dividends due upon the proofs in respect of the bills, he had paid.

Ex parte Marshall, 1 Atk. 129, 131, was cited.

LORD CHANCELLOR [LOUGHBOROUGH] observing, that Snaith and Co. could not be turned into trustees to the prejudice of any right, they might have, made the order, that Snaith and Co. shall take out of the dividend upon the 815*l.* 15*s.*, so much, as would make up the proportion, which they would have received upon the residue of the debt proved beyond the 815*l.* 15*s.*, if that debt of 815*l.* 15*s.* had been expunged; and the rest of the dividend upon the 815*l.* 15*s.* be paid to the petitioner; and that the dividend shall remain in the hands of the assignees, till it shall appear, what proportion Snaith and Co. are entitled to (1).

IN analogy with the present decision, are the cases which have established, that if a bond surety, for one who becomes a bankrupt, pays the penalty of his obliga-

9; *Ex parte Longman*, *Ex parte Jones*, *Ex parte Taylor*, xviii. 71, 283, 284; *Ex parte Machell*, 2 Ves. & Bea. 216; 1 Rose, 447; *Ex parte Harris*, 1 Madd. 583; 1 Cooke Bank Law, 8th ed. 258, &c. So separate creditors cannot vote in the choice of assignees under a joint commission. *Post*, *Ex parte Parr*, vol. xviii. 65; 1 Rose Bank. Cas. 76; *Ex parte Jenson*, xix. 224; *Ex parte Simpson*, 1 Mer. 38.

(1) This case was followed by Lord Eldon, not without considerable doubt.

tion, he is entitled to a *proportion* of the dividends received by the obligee under a commission against the principal debtor; though the debt proved by the obligee may be of different and larger amount than the surety's bond. *Ex parte Rushforth*, 10 Ves. 422; *Paley v. Field*, 12 Ves. 445.

WATT v. WATT.

[* 244]

[1796, APRIL 20, 22; JULY 29.]

TRUST under marriage settlement for the next of kin of the wife, subject to her appointment by will with two witnesses: appointment in favor of the husband by an unattested will being void, the children are entitled, not the husband; who is not of kin to his wife; and whose claim to her personal property is not in that character under the *statute*, but *jure mariti*; and in this case according to the plan of the settlement he was not intended. (a)

By the settlement upon the marriage of Alexander Watt and Martha Ellis, reciting, that Alexander Watt was possessed of 2000*l.* 3 per cent. Bank annuities; and that Martha Ellis was possessed of 4000*l.* 3 per cent. reduced Bank annuities, 150*l.* per annum, long annuity, 2600*l.* 3 and a half per cent. Bank annuities, 350*l.* due upon bond, a leasehold messuage in Westminster, and the reversion of 40*l.* long annuity upon the death of Anthony Hazle and Elizabeth Page; which fortune was estimated at 8000*l.*; and reciting, and it was agreed, that Alexander Watt should execute three bonds for 2000*l.* each payable in six months, a year, and two years, so as to make his property equal to that of Martha Ellis; it was agreed, that the trustees should stand possessed, upon trust, as to the 2000*l.* for Alexander Watt for life, and after his decease, in case his wife should survive him, for her for life; and as to the 150*l.* per annum, the 350*l.* due on bond, and the leasehold premises, for the separate use of Martha Ellis for life, and after her death, in case Alexander Watt should survive her, for him for life; and after the decease of the survivor upon trust to pay and dispose of the said 2000*l.*, 150*l.* per annum, the bond, and the leasehold premises, to and among all

Post, *Ex parte Rushforth*, vol. x. 409; and by the Master of the Rolls, *Paley v. Field*, xii. 435, as an extension of the principle, that a debtor cannot come in competition with his creditors: *post*, *Ex parte Reeve*, vol. ix. 588; *Lodge & Fendall's Case*, stated 589; xvii. 521.

(a) It has been considerably discussed in the books, by what title the husband, surviving his wife, takes her *chores in action*. It has often been said, that he takes by the statute of distributions as her next of kin. But, from the language of the English Courts, it would seem to be more proper to say, that he takes under the statute of distributions *as husband*, with a right in that capacity to administer for her own benefit; for in the ordinary sense, neither the husband nor wife can be said to be *next of kin* to the other. 2 Kent, Com. 136, (5th ed.); *Richards v. Richard*, 2 B. & Adolph. 447; *Whitaker v. Whitaker*, 6 Johns. 112; *Hoskins v. Miller*, 2 Dev. 360; *Dennington v. Mitchell*, 1 Green, Ch. 243; *Byrne v. Stewart*, 3 Desaus. 135. The administration on the estate of the deceased wife follows the interest, and on the husband's death, goes to his representatives. *Fielder v. Hanger*, 3 Hagg. Eccles. 769. But see, *Betts v. Kempton*, 2 B. & Adolph. 273.

and every the child and children of the marriage equally at the age of twenty-one ; and if there should be no child, who should attain that age, in trust to transfer the said 2000*l.* according to the appointment of Alexander Watt by deed or will with two witnesses ; and in default of and until such appointment, in trust for the benefit of such person or persons, as should be the next of kin of the said Alexander Watt at the time of his decease of his own family ; and in the event aforesaid to transfer and pay the said 150*l.* long annuity, the said bond, and the said leasehold premises, according to the appointment of Martha Ellis, notwithstanding her coverture, by deed or will with two witnesses ; and in default of and until such appointment, in trust for the benefit of such person and persons, as should be next of kin of the said Martha Ellis of her own family ; and as to the said three bonds of Alexander Watt for 2000*l.* each, upon trust, that when paid, the sums so received should be laid out in 3 per cent. Bank annuities upon the trusts declared as to the 2000*l.* belonging to Alexander Watt ; and as to the 4000*l.* reduced

Bank annuities, 2600*l.* 3 and a half per cent. Bank annuities, and the reversionary * interest in the 40*l.* long annuity, upon trust for the separate use of Martha Ellis for life ; and after her decease according to her appointment by will with two witnesses ; and in default of appointment, for the next of kin of the said Martha Ellis at the time of her death ; provided, that as soon as Alexander Watt should pay the two sums of 2000*l.* each, which were to be last paid, the settlement thereby made by Martha Ellis being considered as adequate to the said 2000*l.* Bank Annuities and the 2000*l.* secured by the bond first payable, or any or either of them, the trustees should stand possessed of so much of the said 4000*l.*, 2600*l.* and the reversionary interest in the 40*l.* long annuity, as at the market price of the day should be equal to the sum so paid, upon the same trusts as the said 150*l.* long annuity, the bond and the leasehold premises, were before limited ; and so from time to time, as the said bonds should be discharged : Provided also, that the trustees might with the consent of Watt and his wife sell the said 2000*l.*, 4000*l.*, 2600*l.* Bank Annuities, and the said reversionary interest, and invest the produce in freehold or copyhold lands, to be settled upon the trusts, and subject to the powers, provisos, &c. before expressed concerning the said 2000*l.*, 150*l.* long annuity, the bond, and the leasehold premises : Provided also, that in case Martha Ellis should die in the life of Alexander Watt without leaving issue, and his three bonds should not have been discharged, they should be delivered up.

The marriage took place. Martha Watt by a will, dated the 29th of August, 1781, made a general disposition in favor of her husband of all stock, she was entitled to dispose of by her marriage settlement, and of any thing, she might in future be entitled to. By a codicil dated the 26th of December, 1794, she gave all her property to her husband, on condition, that he should not marry ; and in case of his marriage she gave it in trust for her children. There was no

witness to either of these instruments. After the death of Mrs. Watt, Mr. Watt having obtained probate from the Ecclesiastical Court, the bill was filed on behalf of the infant children against their father and the trustees, the Plaintiffs claiming as next of kin of their mother in default of appointment. The Defendant Watt claimed under the will and codicil, or if not, as next of kin and personal representative of his wife, the 4000*l.*, 2600*l.* Bank Annuities, and the reversionary interest in the 40*l.* long annuity. The only payment, he had made on account of his three bonds, was 460*l.*

* *July 29th.* Lord CHANCELLOR [LOUGHBOROUGH]. The [*246] object of this settlement was, that Mr. Watt should bring in a sum equal to his wife's fortune: but all beyond the 2000*l.*, which he actually had, being executory upon his part, the surplus of her fortune, beyond what was considered as equal to that 2000*l.* and the amount of his first bond, was reserved to her separate use, and after her decease, to her next of kin, subject to her appointment; the plan of the settlement being to set that part of her fortune against the two bonds last payable. In the first place it is beyond controversy, that these two papers are no execution of the power. There is no possibility of supplying any defect in the execution of the power. It must be taken, therefore, that the interest of Mrs. Watt is unappointed. Upon the plan of the settlement it is evident, that the limitation to the next of kin of Mrs. Watt as to the 4000*l.* and 2600*l.* Bank Annuities and the reversionary interest in the 40*l.* long annuity must have the same effect as the limitation with regard to the settled fortune; which is in terms to the next of kin of her own family. It is beyond controversy; because first, when the settlement is looked at, it was the intention, that the whole should be settled. It would have been settled, if Mr. Watt had performed his covenant, and paid the bonds. If he had performed his covenant, the settlement directs, that those parts shall be held in trust to the same uses, as the other part of the fortune, that had been actually settled. It would have been settled *totidem verbis* with the other part of the fortune, that was so settled: he would have had an interest for life; and then the children would have taken vested interests at twenty-one; it would have been subject to the appointment, with all the other circumstances directed as to the other part of the fortune; and without doubt the last limitation would have been to the next of kin of Mrs. Watt of her own family. Besides this, the settlement contains a power to the trustees to invest all the funds assigned to them in the purchase of land. If that had taken place, the land purchased would have gone to the heirs of the wife instead of her next of kin. The claim of the husband derives no aid from the probate, he has obtained; for the Ecclesiastical Court has no jurisdiction to determine, whether an instrument is a good execution of the power. The children claim by limitation. If they are the persons, upon whom that limitation attaches, there is no jurisdiction in that Court to determine, who are the objects.

Besides that, the description of next of kin of the wife can in no

respect apply to the husband. He is entitled to the personal property of his wife *jure mariti*: her personal property vests in him by the marriage. At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband; and when you look at the statutes, there is no law, that gives the husband a right by force of the statute to administer to his wife. The husband's right is supposed in all the statutes. The statute 21 Hen. VIII. c. 5, which directs who shall have administration, takes no notice of the husband: they are to grant it to the widow or the next of kin, or both. That statute therefore does not take the widow to be the next of kin. It takes no notice of the widower; for the law gives it to him; and where it was necessary for him to have the authority of the Ecclesiastical Court to enable him to obtain her personal property, he had a right to it. The *Statute of Frauds* (1) has a clause, that the *Statute of Distributions* shall not prejudice the right of the husband; under an apprehension, that his right might be considered to be affected by that statute. The husband is not of kin to the wife; nor she to him. The statute gives administration to the widow. She is not next of kin; but takes as widow (2). The consequence is, I must declare, that the two testamentary papers did not execute the power, and the Plaintiffs are entitled to the 4000*l.* and 2600*l.* Bank annuities and the reversion in the 40*l.* long annuity. Then I must make a provisional declaration. The Defendant Watt has not paid his bonds. If he does, I think, that part of the settlement, notwithstanding the death of the wife, should still be executed. Therefore declare, that the Defendant Watt upon the payment of the two bonds payable in December 1781 and December 1782 will be entitled for life to the dividends of the 4000*l.* and 2600*l.* Bank annuities, and the reversion of the 40*l.* long annuities; and in that case the trustees shall declare the trusts of these funds pursuant to the trusts of the settlement as to the 150*l.* long annuity, the bond debt, and the leasehold premises. The 460*l.* that he has paid, is part of the first bond. The costs must come out of the dividends.

THAT when a married woman dies intestate as to her separate personal property, her husband can claim the succession in virtue of his marital rights only, and not as next of kin, see, *ante*, note 2 to *Fettiplace v. Gorges*, 1 V. 46.

(1) 29 Ch. ii. c. 3, s. 25.

(2) Co. Lit. 46, b. 351; *Bacon v. Bryant*, 11 Vin. 818, pl. 25; *Squib v. Wyn*, 1 P. Will. 478; *Humphrey v. Bullen*, 1 Atk. 458; 11 Vin. 88, pl. 26. If the husband dies without having administered to his wife, her next of kin, taking out administration to her, is a trustee for the personal representative of the husband. *Cart v. Rees*, 1 P. Will. 381; *Elliot v. Collier*, 3 Atk. 526; 1 Wils. 168; 1 Ves. 15. See post, *M'Leroth v. Bacon*, vol. iii. 159; *Garrick v. Lord Camden*, xiv. 372; *Bailey v. Wright*, xviii. 49; 1 Swanst. 39; *Cotton v. Scarancke*, 1 Madd. 45; *Vaux v. Henderson*, 1 Jac. & Walk. 388, n.

QUINTIN, *Ex parte*.

[1796, JULY 30.]

SEPARATE commission of bankruptcy against one partner: the other paid the joint debts: a debtor to the partnership, being also a separate creditor of the bankrupt, was allowed upon petition to set off against the bankrupt's share of the joint debt, and to prove for the residue of his separate debt, the solvent partner consenting to receive his share.

At law there can be no set off between joint and separate debts, (a) [p. 248.]

THE partnership between Shepherd and Williams, attorneys and solicitors, was dissolved in November, 1794. In January, 1795, a commission of bankruptcy issued against Shepherd. Williams paid all the partnership debts. The petitioners were indebted to the partnership for business done, &c. and were separate creditors of Shepherd to a greater amount for money received by him as their agent. The prayer of the petition was to be permitted to set off the bankrupt's share of the debts due to the partnership against the debts due separately from the bankrupt to the petitioners, and to prove the residue of such separate debts under the commission. Williams was contented to receive one fourth of the debts due to the partnership; which was the proportion of his interest.

Solicitor General [Sir John Mitford], and Mr. Cooke, for the Petition, cited what is added by the Reporter to *Lord Lanesborough v. Jones*, 1 P. Wms. 326, and *Mitchell v. Oldfield*, 4 Term Rep. B. R. 123.

Attorney General [Sir John Scott], contra, cited *Ex Parte Edwards*, 1 Atk. 100; and said, the petitioners had no such right to set off at the time of the bankruptcy; and the intermediate act of the other partner paying the partnership debts could not put them in a different situation.

LORD CHANCELLOR [LOUGHBOROUGH]. As at law, there can be no doubt; for the action must be brought in the name of the two; and you cannot set off the separate debt of one. I agree, the right is not to be varied by any thing, that has been done since the commission: but the right is manifest, the account being clear. In equity it would be very hard, where it appears, that all the joint debts are paid, and that the other partner is satisfied, and there is a surplus, in which he is interested in one moiety, and the indebted partner in the other, it would be very hard, if to the extent of that moiety the creditor of that partner cannot set off. I make the arrangement. The assignees are to stand in the place of Shepherd: Williams being contented to receive his fourth is only nominal: then shall I allow the assignees to take the rest and not permit the debtor

(a) Unless there be some special agreement between the parties, or some equitable circumstances, creating it in the particular case. Story, *Partnership*, § 395; 2 Story, *Eq. Jur.* § 1430—1444, and cases cited; *Tucker v. Oxley*, 5 Cranch, 34; Equity generally follows the law in cases of set-off; *Duncan v. Lyon*, 3 Johns. Ch. 358; *Dale v. Cooke*, 4 ib. 11; *Howe v. Sheppard*, 2 Sumner, 409, and cases cited; *Gordon v. Lewis*, ib. 628; *Greene v. Darling*, 5 Mason, 207.

to set off? I think, the equity is a clear and a strong one. In *Ex parte Edwards* there could be no purpose in directing the account, but with a view to allow it.

Ordered according to the prayer of the petition (1).

THE rule at law, that a joint demand cannot be set off against a separate one, prevails, generally at least, in Equity also. *Addis v. Knight*, 2 Meriv. 122. If the principal case can be at all supported, it must be as an exception; and as an exception not much to be approved. *Ex parte Twogood*, 11 Ves. 519; *Ex parte Christie*, 10 Ves. 105. But a creditor, who has a joint security for a separate debt, cannot resort to that security, without allowing what he has received on the separate account. *Ex parte Hanson*, 18 Ves. 233.

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MICHAELMAS TERM.

[37 GEO. III. 1796.]

STRAHAN v. SUTTON.

[1796, Nov. 10, 14.]

To compel a widow to elect to take under a will or dower, her claim to dower must be inconsistent with the will. (a)

MATTHEW STRAHAN by his will gave to his wife Margaret Strahan 20 guineas for her immediate support and maintenance; and also an annuity of 30*l.* for her life, provided she should so long continue his widow; and after some small legacies he directed all the rest and residue of his personal estate not then laid out in the funds to be converted into money by his executors, and to be laid out in the funds upon trust to pay the interest and dividends towards the maintenance and education of his son George Strahan, until he should attain the age of twenty-one; and then to transfer the principal to him for his own use: but if he should die under twenty-one, then upon trust for John Strahan, his executors, administrators and assigns; and he gave his property then vested in the funds with the interests and dividends upon the same trusts. He devised his freehold messuage or tenement with the appurtenances then in his possession to his son George Strahan, his heirs and assigns for ever: but he declared, that the rents and profits thereof should be received by his executors and applied by them towards the maintenance and education of his said son during his minority; and he directed, that his said freehold messuage or tenement or any part thereof should not during the minority of George Strahan be let to or occupied by

(1) *Post*, *James v. Kynnier*, vol. v. 108; *Ex parte Christie*, x. 105; *Ex parte Stephens*, *Ex parte Twogood*, xi. 24, 517. The last of these cases overrules *Ex parte Quintin*, *Ex parte Hanson*, xii. 346; xviii. 232; 1 Rose, 156; *Ex parte Blagden*, xix. 465; 2 Rose, 249; *Valliamy v. Noble*, 3 Mer. 593.

(a) See, *ante*, note (a) to *Wake v. Wake*, 1 V. 335.

his (the testator's) then partner Mr. Brown or Mr. Braithwaite; who formerly lived therein. By a codicil the testator gave to his wife all his household goods and furniture, plate, linen, china and every other implement of household furniture, of what nature or kind soever, and also all his stock in trade, for her own use.

* The bill was filed on behalf of George Strahan, the [*250] infant: and the usual accounts were directed. By the Master's report it appeared, that there was a considerable surplus of the personal estate beyond the amount of the legacies; that there were no debts; that the testator had no real estate except the freehold house devised by the will; of which he was seised of an estate of inheritance; and out of which his widow was entitled to dower. It was of the annual value of 26*l*.

Upon farther directions the question was, Whether the widow could claim the provision given her by the will and her dower, or must elect?

Mr. Lloyd and Mr. W. Agar, for the Plaintiff, and Mr. Richards, for the widow, cited *French v. Davies*, ante, Vol. II. 572, and the cases there referred to, and also *Hitchin v. Hitchin*, Pre. Ch. 133. 2 Freem. 241, and *Incedon v. Northcote*, 3 Atk. 430. The clause of the will directing, that the house should not be let to Brown or Braithwaite, was particularly pressed for the Plaintiff as inconsistent with the claim of dower; and for the widow it was urged, that the annuity was not charged upon the estate, out of which the dower arose; that being only during widowhood it was not co-extensive with the right to dower, which in cases of satisfaction is necessary; and that in *Jones v. Davies* in 1773 or 1775 the testator gave an annuity to his wife, and devised the estate to the Defendant; and the widow was held to be entitled to both.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The only question is, Whether the claim of dower is inconsistent and irreconcilable with the devise of the freehold messuage to the son; for otherwise it is admitted, the widow has a right to both. She does not require his assent to her dower. It was truly said, this is not the case of an annuity issuing out of the premises, of which she was dowable; as it is in the cases in *Ambler*. I am therefore in this case relieved from the question between Lord Hardwicke in *Pitts v. Snowden*, and Lord Northington in *Arnold v. Kempstead*, Lord Camden in *Villareal v. Lord Galway*, Amb. 466, 682. 1 Bro. C. C. 292, n. and Mr. Justice Buller in *Wake v. Wake*, 3 Bro. C. C. 255, (ante, Vol. I. 335) impugned as they are in some degree, by the present Lord Chancellor in *Pearson v. Pearson*, 1 Bro. C. C. 292, and by Lord Thurlow in *Foster v. Cook*, 3 Bro. C. C. 347; which of these great Judges were right in * de- [*251] ducing the consequences, they drew from the wills before them; for this is not that case. It stands upon a totally different ground; namely, whether the gift of the freehold estate to another does or does not raise a necessary inference, that the wife by claiming any interest by way of dower out of that freehold estate must be held

to contravene the intention of the testator; who must be supposed to intend, that the devisee shall take it unencumbered by that claim of the wife. Unless the Counsel for the Plaintiff are successful in their argument upon that clause in the will directing, that the house during the minority of the son shall not be occupied by the particular persons mentioned, unless that makes a difference, it is not distinguishable from *Lawrence v. Lawrence*, followed by *Lemon v. Lemon*, and *Hitchin v. Hitchin*. Those cases have determined, that the gift of an estate to any person, not the wife, does not exclude her from claiming dower out of that estate. *Lawrence v. Lawrence* is the leading case. In that are the words "as a farther provision for his wife" (1). There you might suppose, he might contemplate the provision, the law had made for her. All the arguments, that have been urged here, might equally apply there; that this was all the provision, he meant she should have out of that estate. Lord Somers, a very great Judge, was of opinion, it barred her (2). That decree was afterwards reversed by Lord Keeper Wright; and that reversal was affirmed by Lord Cowper and upon an appeal to the House of Lords. The argument was, that it was impossible the testator could mean, that she should have any other interest in the premises, than he had given her. This is a complete determination; and has been acquiesced in ever since.

Mr. Hargrave (in a note upon Co. Lit. 36, b. n. 227) has, I think, in a summary way stated exactly what I take to be the rule of the Court upon this point. He says, that though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes our Courts of equity have been induced by special circumstances to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should elect; that in *Lawrence v. Lawrence*, Lord Somers made such a decree; because he inferred an intention to give in bar of dower from the testator's having devised the residue of his whole estate to another: but that the reversal of this decree by Lord Keeper Wright, which reversal [* 252] was affirmed in the House of Lords, * is said to have settled the doctrine; and he is perfectly right, I think, in the principle so extracted. Then he refers to *Broughton v. Errington*; which throws great light upon the subject; though it is not a case of dower. It is impossible to state any principle, applying to the one, that does not apply to the other. He adds, that notwithstanding the doctrine, on which *Lawrence v. Lawrence* was finally decided, and the frequent recognition of that case, devises have been since frequently deemed a satisfaction of dower on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will; on which principle Lord Northington is said to have decided for a satisfaction of dower in *Arnold v. Kempstead*,

(1) Those words are used in giving the wife an interest in two farms under a trust term after a devise to her of real estate. See the state of the case, 1 Bro. P. C. 591.

(2) See *Couch v. Stratton*, post, vol. iv. 391.

and Lord Camden in *Villareal v. Lord Galway*. I perfectly agree with Mr. Hargrave, that the principle of *Lawrence v. Lawrence* has never been impeached; and the only question has been, whether a gift out of the same estate was incompatible with the widow's claim of dower upon the same estate. Two great Judges thought, it was incompatible. The present Lord Chancellor and Lord Thurlow thought, it was not. *Pitts v. Snowden* has never been accurately reported in any book. It is most fully in the Appendix to 1 Bro. C. C. 292. I have not found the decree: but there is in the Register's Book, 1751, fol. 372, an interlocutory order made upon a petition for a receiver; which states the will; from which it appears, the annuity given to the widow by the will was to issue out of the same lands, from which the dower was to arise. If that is a true recital of the will, Lord Camden is right in saying, that he did in *Villareal v. Lord Galway* depart from Lord Hardwicke's decision. But I have already said, this is not that case. The only question is, whether this provision for the widow is inconsistent with her claim of dower. It was admitted very fairly by the Plaintiff, that if this had been only a legacy of 20 guineas, the same argument would have arisen; and it was argued, that the clause, that the house should not be let to two particular persons, is inconsistent with the claim of the dower. For that it must be contended, that she will insist, that her dower shall be set out by metes and bounds. If such a circumstance as that was to turn against her the current of authorities in her favor, it would be most extravagant. I must suppose, every testator meant to give all he had a right to give. So did this testator. The case is clearly decided; that a gift of an estate, out of which the widow is dowable, does not prevent her from taking any other estate, *the testator has thought fit to [* 253] give her. I will suppose the words were "all the rents and profits:" but there is not the word "all." I do not think that strange clause can have the effect contended. I do not know, whether it can be enforced; for if they do let the house to these persons, who is to file the bill? That term in the will might be made use of by the widow to impugn his intention: but it does not necessarily impugn the intention of the will. It has been determined, that the widow need not take it by metes and bounds: she may take a rent-charge: she may take one third of the rents and profits. To think she would occupy one chamber in this house, in order to let it to these persons, is really most extravagant. Declare, the widow is not barred.

I hope this may be considered as in some degree *res judicata*, unless where there are other circumstances (1).

THAT a widow can never be put to her election, between her paramount title to dower, and a bequest of something else, unless the intention of the testator to confine her to one of the provisions is clearly demonstrated, see, *ante*, notes 2 and 3 to *Wake v. Wake*, 1 W. 335.

(1) See Mr. Sanders's note 2 Atk. 426, and the notes, *ante*, vol. i. 259, 337.

BROOKE v. HEWITT.

[1796, JULY 15.]

THE ground of a demurrer must be a short point, upon which it is clear, the bill would be dismissed with costs at the hearing; (a) therefore upon a bill by assignees of a bankrupt for specific performance of an agreement previous to the bankruptcy to grant a lease, (b) the case consisting of a combination of circumstances, the evidence might sustain the relief with some modification; upon which a demurrer was overruled.

Bankruptcy of a person, who has agreed to purchase, does not discharge the contract, [p. 255.]

THIS bill was filed by Rich, a bankrupt, and his assignees; and it prayed, that the Defendant Honor Hewitt might be decreed specifically to perform an agreement by making a lease of certain premises either to the bankrupt or his assignees; and that if the Defendant Neville should set up any subsequent agreement or lease, he might be declared a trustee for the Plaintiffs; they offering to do all such acts and things, and to execute such counterpart of the lease and the covenants therein, as the Court should direct.

In order to make out the agreement, the bill stated a correspondence in 1795, by letters between Mrs. Hewitt, her agent, and Rich, before his bankruptcy; by which it appeared that the Defendant Hewitt proposed a lease to Rich at 100*l.* a year, clear of taxes: he offered 90*l.* a year, clear of taxes, provided certain repairs should be made, or a sum of money allowed. To this proposal Mrs. Hewitt consented; and she proposed to send a person to meet one from Rich about the repairs. The bankruptcy taking place soon afterwards, nothing farther was done. The term proposed to be granted did not appear upon these letters. The bill stated, that it was understood, that the said lease was to be made for a term of [*254] *years commensurate with the life of Honor Hewitt, who held the premises for her life; to commence from the 29th of September, 1795, when Helps, the tenant, was to quit; which he did accordingly. The bill charged the Defendant Neville with notice.

The Defendants demurred generally.

Mr. *Fonblanque* for the demurrer. The question is, whether the Court will direct a specific performance, notwithstanding the change, that has taken place in the circumstances of one of the contracting parties. The Court has a discretion; in the exercise of which it will do substantial justice. There is no principle or authority, that

(a) Story, Eq. Pl. § 526. It must be founded on some dry point of law, which goes to the absolute denial of the relief sought. *Verplank v. Caines*, 1 Johns. Ch. 57. See 2 Maddock, Ch. 282.

(b) Whether the assignees of a bankrupt can compel a landlord specifically to perform an agreement to grant a lease to the bankrupt, see 1 Maddock, Ch. 422. In *Flood v. Finlay*, 2 Ball & Beat. 9, the question was made without being decided. See, *ante*, p. 168, note (a) to *Willingham v. Joyce*; also, *McIvor v. Ryger*, 3 Wheaton, 53.

the agreement ought to be performed notwithstanding such change. It has been held, that assignees of a bankrupt are not entitled to the benefit of a covenant of renewal entered into before the bankruptcy: *Drake v. The Mayor of Exeter*, 1 Ch. Ca. 71. That is recognized in *Moyses v. Little*, 2 Vern. 194. *Wiseman v. Vandeput*, 2 Vern. 203. In *Willingham v. Joyce*, ante, 168, the Master of the Rolls held, that he could not enforce such an agreement for a person in insolvent circumstances, though not a bankrupt. It may be true, that a purchase would be enforced notwithstanding a bankruptcy; for then the assignees must first do equity by paying the purchase-money: but in this case the consideration is subsequent, and cannot be satisfied immediately; namely, payment of rent, covenants to keep in repair, &c. There is no perfect contract stated by the bill. I admit the case stated by the bill to the utmost extent of it.

LORD CHANCELLOR [LOUGHBOROUGH]. There is a great deal of force in your reasoning: but it does not apply to the point of a demurrer. The cases, you reason upon, are, where executory contracts were entered into by persons afterwards becoming bankrupts. Great difficulty might occur to the Court upon the question, whether they could go on to perform a contract under such circumstances: a person contracting with another for future performance. But suppose it established, that this is more than treaty, and a complete agreement, which perhaps admits of considerable doubt, the bankrupt was entitled to the estate at the time of his bankruptcy: and I cannot take it short upon a demurrer, that there is nothing for the Court to do. It struck me, that there is no perfect contract stated by the bill: but I am afraid that is not a point *for a de- [*255] murrer; which must be a neat short point, an absolute denial of the title of the Plaintiff. The mischief is, that I am hearing a clause consisting of a variety of circumstances without the circumstances being in evidence before me. The evidence might very much affect this case. This was a treaty carried on by the intervention of an agent and a correspondence through that agent. The nature of his agency, the communication had with him, will influence the construction of the letters. It would be very difficult to force an import upon these circumstances without any evidence. There is a combination of circumstances; and if you could bring it to a point, whether upon the hearing the Court is to decree upon the bill, or to refuse an interposition, leaving the parties to law, that can never be a ground of demurrer. I was a good deal struck with it as a hasty opinion, as every opinion upon a demurrer must be, that this was more a treaty than a complete agreement.

It must be a very strong case, that would induce the Court to carry into execution an agreement between landlord and tenant, the estate not being executed at law, where the person, who is to become the tenant, has become a bankrupt. The Court must certainly upon the circumstance of the intervening bankruptcy do a great deal more in respect of the Defendant than merely decreeing a specific performance. It is impossible to dispose of it upon a demurrer.

There are a great many shades and circumstances. A demurrer must be founded upon this; that it is an absolute, certain, clear, proposition, that the bill would be dismissed with costs at the hearing. It is not a dry point of law. It is a case of circumstances; in which a minute variation of circumstances may either incline the Court to modify the relief, or to grant no relief at all. I cannot say, the bankruptcy discharges the contract, as a general proposition; the case you state of a purchase does not discharge the contract. I am to consider, whether I can put any terms upon the assignees, that shall make them do equity. The assignees might have made an agreement to sell this lease, making a profit upon it, to a person, to whom there could be no objection. I cannot say now, that they may not have put the case under terms, that would oblige me to perform it, supposing it a complete agreement. Certainly the case will be attended with considerable difficulty to them at the hearing: but I cannot determine it upon a demurrer. Over-rule the demurrers (1).

[*256] *The *Solicitor General* [Sir John Mitford] said, Lord

Thurlow under similar circumstances executed such an agreement concerning a house on Ludgate-hill. His Lordship said, the bankruptcy was an assignment; and if the party had made an actual assignment, the assignee would without doubt be entitled to a performance; because the lease would be to him and his assigns. The only objection is, that the covenant of the bankrupt would undoubtedly be of less value: but the assignee ought to enter into all the covenants.

1. As a general proposition, the bankruptcy of a contracting party does not discharge the contract; see, *ante*, the note to *Willingham v. Joyce*, 3 V. 168.

2. As to the grounds which are sufficient to support, or overrule, a demurrer, see note 3 to *Utterson v. Mair*, 2 V. 95.

BROWN v. RAINDLE.

[ROLLS.—1796, Nov. 17.]

COPYHOLDER having power to bar the widow's free-bench by surrender, any act by him for valuable consideration will bar her in equity.
Covenant by joint-tenant to sell severs the joint-tenancy in equity, though not at law, [p. 257.]

THIS bill was filed for a foreclosure, and to compel a surrender of a copyhold estate for three lives, under a covenant in the mortgage deed, 2d July, 1792, to surrender those premises as an additional security.

The question was, whether this covenant of the mortgagor barred

(1) See *Willingham v. Joyce*, *ante*, 168, and the references in the note, 169.

the right of his widow to free-bench. The custom of the manor appeared by the evidence to be, that the copyholder could convey these estates by surrender; but where he dies seised of the estate, the widow is entitled to the estate during her widowhood as her free-bench.

Mr. *Lloyd* and Mr. *King*, for the Plaintiff. The difference between dower and free-bench is, that if the husband is once seised, the widow's right to dower attaches, and cannot be barred in any way but by fine: but the free-bench is entirely in the power of the husband during his life; and unless he dies seised, and has made no alienation during his life, his widow will not be entitled: *Salisbury v. Hurd*, Cowp. 481. If the surrender would have done, a covenant for valuable consideration is in this Court equivalent, and as much an alienation. It would have turned the husband into a trustee for the mortgagees from the execution of the covenant, as an actual surrender would have taken the seisin out of the husband at law. This point is determined by Lord Hardwicke: *Hinton v. Hinton*, 2 Ves. 631, 638.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I had occasion lately to look into that case. I had no doubt about it. It is perfectly clear. The right of the *widow of a copyholder arising out of her estate, which is in his power during his life, may be barred by him by any act done for valuable consideration; whether conveying a legal estate, or otherwise. It is very different from an estate-tail with remainders over; for those estates are not in the power of the party, till the recovery is suffered. They are estates not arising out of the estate of the tenant in tail. Upon the evidence, supposing this a widow's estate arising out of an estate, of which the husband was complete owner, and could bar her estate, I am of opinion, it is that sort of estate, which any equitable conveyance will bind. Any act of the husband for valuable consideration bars her equally with a legal surrender; and she is compellable in equity to surrender pursuant to such contract. A covenant by a joint-tenant to sell, though it does not sever the joint tenancy at law, will in equity. I have always understood this as a settled point, and have no difficulty upon it. Therefore let her convey all her estate and interest in the copyhold premises according to the deed of the 2d of July, 1792, subject to redemption.

The Defendant waiving an inquiry as to the custom, the Plaintiffs consented to pay all costs.

THE case of *Musgrave v. Dashwood*, as reported in 2 Vern. 63, seems in opposition to the present decision; but see *Hinton v. Hinton*, 2 Ves. Sen. 638, where Lord Hardwicke shows *Musgrave v. Dashwood* not to be an authority on which any reliance can be placed; and where the doctrine, that a contract by a copyholder, for valuable consideration, will bar his widow's claim to free-bench, is established. The same case of *Hinton v. Hinton* is also itself an authority (and cites others) for holding that a contract not formally completed, may, in Equity, be sufficient to sever a joint tenancy; in this respect likewise differing from *Musgrave v. Dashwood*. As to this point see *Burnett v. Kinaston*, 2 Freem. 241. But, though an agreement may be sufficient in Equity, to sever a joint tenancy, the agreement must be positive. *Partridge v. Poulton*, 2 Atk. 54.

DAVENPORT v. HANBURY.

[ROLLS.—1796, Nov. 17, 21.]

UNDER a legacy to the issue of A. all descendants are entitled, and take *per capita* as joint-tenants. (a)

“Equally” makes a tenancy in common, (b) [p. 260.]

THIS cause arose upon a legacy to Mary Davenport or her issue (1).

Mary Davenport died in the life of the testator. She left only one child living, a son: and two grand-children, the children of a deceased daughter.

Two questions were made: 1st, Whether the grand-children were entitled with the son: if so 2dly, Whether they should take *per capita* or *per stirpes*:

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This depends entirely upon the construction of the word “issue.” [* 258] *Wythe v. Thurston*, Amb. 555 (2), was *quoted. I have sent for the Register’s Book, and shall not make my decree now, but will only state, that the report is not quite accurate as to the words. That case determines, that the word “issue” admits all the issue of the person, to whose issue the gift is made: but whether they were to take *per capita* or *per stirpes* may depend possibly upon the words, and not determine the point before me. Lord Hardwicke’s decree fully establishes, that “issue” includes all the descendants. I will state the words in that case, as they really are. It is in the Register’s Book of 1748 by the name of *Wythe v. Blackman*; and was upon a deed, not by will, as this is. The trust was, that the trustees should sell the said settled premises, as soon as conveniently might be; and that the money thereby arising, together with the mesne profits of the said premises, should be equally divided between the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, or the respective

(a) Who are entitled under the description of “issue,” see 2 Williams, Exec. 807–810. When employed in a will as a word of purchase, it will, in its ordinary import, comprise all who claim as descendants from or through the person to whose issue the bequest is made, that is, grandchildren and great-grandchildren, as well as children; and in order to restrain this usual sense of the word, a clear intention must appear upon the will. Ibid. 810, and cases cited; *Dalzell v. Welch*, 2 Simon, 319. But it has been held, when coupled with the word parent, to be a correlative term, and to be taken in the sense of “children.” Ibid. See, also, *Pearson v. Stephen*, 2 Dow & Cl. 328; *S. C. 5 Bligh*, N. C. 203; *Lees v. Mosley*, 1 Y. & C. 589; *Ryan v. Cowley*, Lloyd & Goold, 7. In the present case the issue took as joint tenants, but in most of the States of the United States a joint tenancy cannot be created except by express words. See 4 Kent, Com. 362 (5th ed.) So a devise to a wife for life and after her death to nephews, has been held a tenancy in common in the nephews. *Coleman v. Hutchinson*, 3 Bibb, 209. See also *M’Neilladge v. Galbraith*, 8 S. & R. 43; *M’Neilladge v. Barclay*, 11 S. & R. 103, where property left to “poor relatives equally” was divided *per capita*.

(b) As to joint tenants in chattels, see *post*, p. 628, note (a) to *Morley v. Bird*.

(1) See the clause of the will stated in *Boyle v. Hamilton*, *post*, vol. iv. 437.

(2) Reported also, 1 Ves. 196.

issues of their bodies, in case they or either of them the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, should be dead at such time, as there should happen to be a failure of issue male of John Thurston the younger, share and share alike: to wit, to each of them or their respective children one fourth part thereof; and in the said indenture was contained a proviso, that if any of them, the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, should happen to be dead without issue at such time, as there should happen to be a failure of issue male of the said John Thurston, then the money should be equally divided between the survivors of them and the said Mary Wythe, Dame Elizabeth Chancey, Ann Blackman, and Elizabeth Thurston, or their respective children, in case any of them be then dead, leaving issue of their bodies.

The trust therefore was for those four persons, or the respective issues of their bodies. It does seem, that Lord Hardwicke divided it *per capita* among themselves; making stocks of the four sisters. But the words in that case are very different from those in this. Here it is contended, that the son shall take all; or if not, half: but it is clear, the grand-children are to take: the only doubt is, whether they shall take *per capita* or *per stirpes* (1). That is a matter, I shall not determine now. I am rather inclined to think, Lord Hardwicke's distribution arose from the particular words of the * deed. I shall examine that decree very strictly, before [*259] I decide that they are to take otherwise than as joint tenants of this fund.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This cause depends entirely upon the construction of these words "to Mary Davenport or her issue." I apprehend, there is no doubt, that the word "issue" has ever been considered as embracing other objects than children; and the only remaining question is, whether they are to take *per capita* or *per stirpes*. It was contended, that though that embraces all, they shall not take *per capita*; but the fund must be divided according to the stocks, from which they are derived; and for that purpose *Wythe v. Thurston* was cited as a decision by Lord Hardwicke, that under similar words "issue" was held to comprehend all the descendants; but they were to take *per stirpes*. It is very shortly reported by Ambler; therefore I thought it necessary to look very accurately into the Register's book; from which I stated the case, when this cause came on before. When that is considered, the authority of that case does not in any degree militate against my opinion; and I repeat it, that it may not be supposed Lord Hardwicke meant to lay down, that the word "issue" would not comprehend all the descendants, and that they would not all take either as joint-tenants; or if the words "equally to be divided" were added, as tenants in common. It was upon the particular words of that case, that Lord Hardwicke confined the distribution

(1) *Barnes v. Patch*, *post*, vol. viii. 604.

to their rights *per stirpes*. That case was followed by *Gale v. Bennett*, Amb. 681; in which Lord Northington relied much upon the former decision. In those two cases Lords Hardwicke and Northington were of opinion, that all the issue should take; but not *per capita* but *per stirpes*: but those determinations arose from the peculiar words giving the fund first to the children, then, in failure of all issue, over to third persons. That leaves the question as to the import of the word "issue" exactly, as if those cases were not determined; and I am now to determine upon the word "issue." When used as a word of purchase, it has been always considered as synonymous to and the same as "descendants;" and whoever can make himself out a descendant of the person, to whose issue the bequest is made, has a right to be considered as *persona designata* in that bequest. The very case occurred before Lord [*260] Thurlow: *Butler v. Stratton*, 3 Bro. C. C. 367; *where upon the word "equally" they were held entitled in common; therefore I must suppose, if the word "equally" had not been added, they would have taken as joint-tenants (1).

The word "issue," therefore, there being no particular words in this will, as there were in the two cases before Lord Hardwicke and Lord Northington, embraces all the descendants: and as there are no words of severance, nor any thing to show he meant they should take, not in their own rights, but as representing others, the son and the children of the daughter must be considered as *personæ designatæ*, and will take as joint-tenants.

In *Butler v. Stratton* were cited *Thomas v. Hole*, For. 251, and *Phillips v. Garth*, before Mr. Justice Buller, 3 Bro. C. C. 64; and they are according to my opinion. The latter was upon the words "next of kin." Lord Thurlow did not doubt the principle, that they must take *per capita*, if intended; but doubted, whether those descendants from the next of kin were not excluded under those words. But I do not find any where, but that "issue" is a word of purchase, and embraces all descendants (2).

1. WITH respect to the varying construction of the ambiguous word "issue," see, *ante*, notes 1 and 2 to *Hockley v. Maubey*, 1 V. 143. See also *Horsepool v. Watson*, 3 Ves. 384, and *Freeman v. Parsley*, 3 Ves. 423.

2. As to the words which create a tenancy in common, see note 4 to *Perry v. Woods*, 3 V. 204.

3. Whether, under a devise, children are to take *per capita*, or *per stirpes*, depends upon the previous question, whether they are to take in their own rights, or by representation; in the first case, they take *per capita*. *Lady Lincoln v. Pelham*, 10 Ves. 176; *Blackler v. Webb*, 2 P. Wms. 384; *Northey v. Strange*, 1 P. Wms. 342. Upon the latter supposition, they take *per stirpes*. *Rowland v. Gorsuch*, 2 Cox, 189.

4. In what cases grandchildren may take under bequest to "children," see note 5 to *Bristow v. Warde*, 2 V. 336.

(1) *Rigden v. Vallier*, 3 Atk. 731. So "between them:" *Lashbrook v. Cook*, 2 Mer. 70.

(2) *Post*, *Freeman v. Parsley*, 421; *Reeves v. Brymer*, vol. iv. 692, and the note 696; *Sibley v. Perry*, vii. 522; *Barnes v. Patch*, viii. 604; *Radcliffe v. Buckley*, x. 195; *Bernard v. Montague*, 1 Mer. 422, xi. 508, in the note; *Leigh v. Norbury*, xiii. 340; 3 Ves. & Bea. 67; 1 Mad. 387, 8; *Crosley v. Clare*, 3 Swanst. 320, n.

BRADBURY v. HUNTER.

[1796, Nov. 14, 15, 22.—ANTE 187.]

THIS cause, reported *ante*, 187, was again brought on under the permission then given by the Lord Chancellor, that the decree should rest in minutes some time for that purpose. It was re-argued by the *Attorney General* [Sir John Scott] and Mr. *Whishaw*, for the Plaintiffs, and Mr. *Mansfield* and Mr. *Lloyd* for the Defendants. For the Plaintiffs it was pressed, that at least there should be an inquiry into the circumstances.

The Lord CHANCELLOR [LOUGHBOROUGH], after the conclusion of the argument for the Plaintiff, threw out the following observations :

Without prejudicing the argument, that may come on, I will repeat the ground, that struck me. I consider the Defendant, not as a mere volunteer, but as a remainder-man. He has a right to * have that estate, which was contracted for. His [* 261] father covenanted to lay out a certain sum in discharging incumbrances. The fact is, that in breach of that covenant part of those incumbrances has affected the inheritance of the estate. A person, who contracted with Mr. Hunter for the execution of his power, would have had a better right than the remainder-man under the settlement: but Mr. Hunter having broken that covenant could not voluntarily charge. It would not be general assets. He could not charge for himself. The execution of the power, after he broke his covenant, must be supported by the *bona fides* of the person, in whose favor he executed it. If money had been actually advanced, that would have supported it. Upon looking into the evidence, the party applying appears under circumstances, that makes it very difficult for the Court to allow him to proceed. A mere purchaser of an annuity, at the distance of two or three years he tries to catch in this security: he takes a mortgage, not only for the money advanced, but for all the money in arrear; and having taken this security, he retains to himself all the annuity securities; therefore he might choose to be an annuity creditor, if Mr. Hunter's funds were good; but if Mr. Hunter dies before any thing farther is received upon the annuity, he turns round, and chooses to come in under the power. It appears to me, upon the report, that he chose to put the case two ways before the Master. The remainder-man stands in a favorable situation; his estate having been by the improvidence of his father charged beyond the sum, with which it was contracted that it should be charged.

Nov. 22d. Lord CHANCELLOR. In this cause I have had great satisfaction in the case having been re-argued: not that I felt myself impressed with any different idea from that I had taken up; but I have the satisfaction to know, that it is impossible, that the case could be more ably argued, or more investigated; and that the

opinion, I have formed, is formed upon the fullest information, the Court can receive. When this first came on, I was not much acquainted with the causes of *Creuze v. Hunter* and *The Bishop of London v. Hunter* (1). I was only acquainted with some of the circumstances, that had occurred in the Master's office. I then hesitated, whether this claim was proper as an original bill.

[* 262] Upon looking into those *two causes, that doubt is greatly strengthened; for upon looking into them it appears, that all the parties were brought before the Court; and the question raised in this cause was very fully in issue: it was in fact decided; and properly and competently decided; for, whatever claim these Plaintiffs could make, there was a means of having it fully investigated in every view, in which it could be put; and a full decision could have been given upon it. The state of the case however represented, that the question as between the remainder in tail and the trustees of Mr. Shepherd had not been fully discussed; that the right, they would have to come upon the remainder in tail, was not distinctly before the Court; and one point was stated, which, if it had been made out, I think would have been a good ground for an original bill; that in the result the life estate of Mr. Hunter had paid a sufficient sum of money in aid of the inheritance to give him a right to charge the 4000*l.* upon the estate of his son. If that had been made out, that would have been a good foundation to have entertained the bill. Upon investigation of the fact however it turned out, that it was otherwise: and the clear result of the examination has been, that Mr. Hunter had left undischarged of incumbrances, that he was bound to discharge, a sum of at least 5000*l.* Without going farther into the objection, that might have been made to the competency of this suit as an original cause, take it upon its own merits. The Plaintiffs coming here, having no legal right, to raise under the authority of this Court the sum demanded upon the settled estate, which Mr. Hunter had covenanted should go to his son clear of incumbrances, at least to a certain extent, the first consideration is, whether the Plaintiffs can show in equity any title to affect that interest, which this Court is always bound to protect; the interest of a remainder-man in tail, who is a purchaser under the marriage settlement, and is entitled to the protection and aid of this Court to have that estate contracted for in the settlement, and distinctly for valuable consideration.

The settlement made upon the marriage of Mr. Hunter was under the circumstances perhaps a little difficult to have accomplished. He had a large estate, but incumbered by his father having mortgaged, and with portions upon it. The lady, he was about to marry, was entitled to a large fortune. The parties chose

[* 263] * to do what appears at first view a very indiscreet thing.

Mr. Hunter was known to have granted annuities upon the estate, of which he was tenant in fee. It was very important to

(1) 4 Bro. C. C. 157, 316; *ante*, vol. ii. 157.

clear those off. It was hoped, the charges, he had brought upon the estate, might be cleared. The marriage took place in Ireland : the annuities were in England. They contented themselves, instead of inquiring what these annuities were, with a covenant from him to apply 8000*l.*, part of the fortune he was to receive, in discharging the annuities ; and they bound him to do it within a year. They did not vest the money in trustees, but contented themselves with that general covenant ; perhaps thinking Mr. Hunter could deal best with his annuitants. A power was given to Mr. Hunter, supposing his covenant performed, to charge 4000*l.* for any purpose, he might think good.

The equity of the case clearly requires, that Mr. Hunter should execute no power for his own benefit, unless he had fully performed all, he had bound himself to do in behalf of those taking under the settlement. I agree, if the day after the marriage he had executed the power in behalf of any person, who had advanced him money in view of that power, it would have been a good charge, that this Court would have executed, whether he had performed his covenant, or not. If for valuable consideration, it would have been good ; for the person, in whose favor it was executed, would have got, though not the legal title, yet he would have got all the right, which Mr. Hunter had. After the covenant was broken, that is, after a year had expired, the case would deserve a very different consideration. It appears to me, the more I consider it, still more doubtful, whether, if the day after the year expired, Mr. Hunter had executed his power for a person advancing his money upon the faith of the specific execution of that power, that would have been effectual ; and I do not know, whether the settlement, whimsical as it is, is quite so careless, as it appears at first view. This is obvious ; that Mr. Hunter had no legal estate. He could not create a legal charge upon this settled estate by any means except by clearing off the mortgages ; by which he might have recovered the legal estate to himself. If he had done that, he would have executed his covenant over and over again : he would have relieved the estate to a much more considerable extent, than he was bound to do. He did not do that ; but remained entitled to the equitable interest only. Then it is to be * considered, whether [*264] a Court of Equity would not require of the person dealing with him to get that information, which the settlement itself, which must have been produced to him, would have pointed out. Upon the production of the settlement, the persons contracting must have seen, that the estate was supposed to have been incumbered. He would also have seen by the settlement, that within a year there was to be an application of the sum of 8000*l.* to discharging incumbrances ; also, that there was a person, who could enforce or release that covenant. From that person they might have been informed, whether the covenant was in part or in the whole performed ; and with his privity, much more if he had concurred with them, they would have been perfectly safe. A fair mortgage would have done

so. It is very clear, a scrupulous mortgagee would have thought that necessary.

But whether I am right in this, or not, it is not necessary to decide to that extent; for whatever might have been the consideration of a mortgagee for money actually advanced without actual notice, even against the tenant in tail under the settlement, yet this is perfectly clear, that Mr. Hunter having broken his covenant could not execute the power without valuable consideration in any respect to gain an advantage, a personal advantage to himself: nor could he execute it in favor of any person, who had notice of the circumstances, in which he stood; not having performed his covenant at the time he attempted to make a valid charge in their behalf. That leads me to the circumstances; and I can take them in no other way than as they have represented their own case. Every transaction bears against their statement; and so strongly, that it could not by any inquiry, (which is prayed by the Attorney General), come out in their favor. The bill states an application to the trustees by Mr. Hunter to lend a sum of money, to accommodate him, upon the security of his power. Accordingly they did sell out the Orphan stock, upon a positive agreement, that he was to execute his power of charging 4000*l*. He was to pay common interest of 5 per cent. The transaction itself would have been a little whimsical, considering the circumstances, in which Mr. Hunter was known to be. Whatever may be the real state of the case, I never can possibly allow the statement and claim, they gave in before the Master, to be varied. The statement, they *made was, that in order to increase the income of the *cestuis que trust* the trustees were applied to to sell out the stock, and to purchase an annuity; that they did accordingly sell, and purchase an annuity, not from Mr. Hunter, but from Raymond, giving him, Raymond, the advantage of selling for seven years' purchase what he had paid but six for. They advanced 2100*l*. for an annuity of 300*l*., for which Raymond had paid 1800*l*.; and at the time, it was before any payment of that annuity could become due: the bond and judgment to Raymond was upon the 11th of January; and their purchase was made in June following. They stand therefore as derivative purchasers from Raymond under these circumstances. Upon this annuity nothing appears to have been paid. Mr. Hunter was no party to the deeds at all. The claim then states, that there being an arrear of the annuity to the amount of 1075*l*., they proposed to Mr. Hunter in 1780 to redeem his annuity upon his paying them very unreasonable terms; all the arrear together with the 300*l*. advanced to Raymond, which had not gone to the profit of Mr. Hunter at all; and they keep up all the annuity securities; and they claim as annuity creditors; having at that time compounded their annuity upon the terms of being paid all they had advanced to Raymond with the annuity up to the day. The calculation was to September: the transaction did not take place till December: then under what circumstances do they stand? A bill had been filed the November pre-

ceding. In November a *subpoena* issued against Mr. Shepherd ; and an appearance was entered for him. It was by Shepherd that all the business was transacted. Then he was informed by the bill, that Mr. Hunter had not performed his covenant : he was informed of the existence of the power to charge : he was perfectly informed of the circumstances, under which that was held ; and he was informed of the prayer of the creditors ; a fair prayer ; and what this Court would have done for them : that he should charge, not for the annuity creditors, but for all these creditors, by making the 4000*l.* available to the settlement by discharging those incumbrances, which were prior both to the annuities and to the son and the interests under the settlement. It is impossible not to suppose, that the idea of getting hold of this 4000*l.* was suggested by the communication, the bill made. I do not therefore see, how it is possible for the Court, acting upon an equitable interest, against the tenant in tail in equity entitled to the estate upon the consideration * of [* 266] marriage, to give the smallest assistance to a claim so made out under all these circumstances ; adding the other circumstances of distress and the outlawry appearing upon the report. It does not appear in all the wreck and ruin of Mr. Hunter's affairs that any party till this singular period ever thought of calling upon him to execute his power. In all his distress he never appears to have had an idea of executing it : and in truth it would not have been honest in him, standing in those circumstances and not having performed his covenant, to have done so.

An inquiry was pressed for : but no inquiry could do good. They attempted it before the Master. They offered to produce affidavits to the Master, and he very properly refused to admit them, to show, that the transaction was different from what it appeared upon the deeds. They wanted to show, by affidavits, that Mr. Hunter was privy to the payment to Raymond. The Master very properly refused it ; for the money was paid to Raymond ; and Mr. Hunter was no party to the transaction.

Therefore I think, the minute, I had directed to be taken, ought not to be varied. I am sorry for it ; but taking it as it appears here in Court, I must make them pay the costs of the cause.

by her will ; and for want of appointment, to her in fee ; with power to Mr. and Mrs. Burnaby to revoke the uses and to appoint new uses. A recovery was suffered accordingly in Trinity Term, 21 Geo. III. By indentures of lease and release, dated the third of April, 1794, the uses of the recovery declared by the deed of June 1781 were revoked ; and new uses were limited according to the appointment of Mr. Burnaby ; and in default of and until appointment, in trust for him for life ; and subject thereto to the use of him, his heirs and assigns for ever.

The third part, to which Mary Swinfen became entitled, descended to her son Samuel Swinfen.

The third part, which descended to Catherine Abney, as only daughter of Mrs. Wooton, was settled upon the marriage of Edward Abney, one of the younger sons of William and Catherine Abney.

[* 272] * The bill was filed for specific performance of an agreement entered into by the Defendant Griffin for the purchase of the whole estate. On his part the following objections were taken to the title :

“ Mr. William Abney at the time of executing the deeds of the 7th and 8th of June, 1781, in order to make a tenant to the *præcipe*, had no estate whatsoever in the premises. The entire fee was devised by Mrs. Clarke’s will to her trustees ; who were to receive and to pay over the surplus of the rents and profits to the separate use of Mrs. Abney during her life. At the utmost this could only give her an equitable estate for life ; and by the conveyance made use of, namely, lease and release, (the husband having no estate,) she could not make a good tenant of the freehold for suffering a recovery. Farther it does not appear, that Mrs. Burnaby had any vested interest during her mother’s life-time. No limitation was made to her, or could arise till after the death of the mother. The trustees were to wait that event, and then by a settlement (which they have never yet made) to convey and assure the premises to such persons and for such estates, as Mrs. Clarke’s will and the decree in Chancery directed ; it being uncertain, who the persons entitled might then be : therefore upon the whole the recovery was not well suffered. With respect both to Mrs. Burnaby’s and Mr. Swinfen’s shares, in order to lay a foundation for such title it is necessary, that the persons, who are now trustees under Mrs. Clarke’s will, should, as Mrs. Becher and Mrs. Abney are both dead, carry the trusts of the will into execution by making such settlement and limiting such estates to such persons, as the will directs, and in obedience to the decree in Chancery ; and such settlement should be prepared under the Master’s direction.

When the cause came on, it was referred to the Master ; who made his report in favor of the title ; stating as the ground of his opinion, that all the remainders being equitable remainders, the trustees under Mary Clarke’s will were not necessary parties to make a tenant to the *præcipe*.

Exceptions were taken to the report. On the 16th of July, 1796, the exceptions were over-ruled; and a specific performance *was decreed; and it was referred to the Master to [*273] settle the conveyance. It was brought on again upon the petition of the Defendant for a rehearing.

Solicitor General [Sir John Mitford], Mr. Graham, and Mr. Johnson, for the Defendant. There is no doubt, that an equitable recovery will have all the consequences of a legal recovery: but it must be attended with the same circumstances as a legal recovery. In *North v. Champernoon*, 2 Ch. Ca. 63, 78. 1 Vern. 13, the rule is laid down with great clearness; and it is extracted by Mr. Cruise in his "Essay on Fines and Recoveries." That was the rule, upon which Sir Thomas Sewell finally decided *Salvin v. Thornton*, 1 Bro. C. C. 73, n. Amb. 545, 699. Mrs. Abney had no estate either in law or equity. It was clearly intended, that the estate should be fully and absolutely in the trustees during the lives of Mrs. Becher and Mrs. Abney; and that those trustees should have the equitable as well as the legal estate in them. Mrs. Abney has only an equitable interest in the surplus rents and profits, after they shall have come to the hands of the trustees. If she had any estate, she could not part with it but by fine.

Attorney General [Sir John Scott] and Mr. Lloyd, for the Plaintiffs. Mrs. Abney must have had an equitable estate; *Lord Say and Seale's Case*, 1 Eq. Ca. Abr. 383. *Shapland v. Smith*, 1 Bro. C. C. 75. What can that interest be, which is neither a legal nor an equitable estate? If she had an equitable estate, she had it with all the incidents and powers necessary to the enjoyment of it. It is incident to the separate estate of a *feme covert*, that she should have the power of disposing of it: *Grigby v. Cox*, 1 Ves. 517. *Fettiplace v. Gorges*, *Pybus v. Smith*, 3 Bro. C. C. 8, 340; *ante*, Vol. I. 46, 189. Lord Thurlow said, he would hold a *feme covert* a *feme sole* to the extent, in which the instrument creating her separate estate makes her proprietor. In *Wright v. Lord Cadogan*, 6 Bro. P. C. 156, the will was void at law; yet in this Court the heir was bound; because the intention was, that the wife should enjoy to her separate use. The trustees in this case must have the legal estate; therefore the other estates are all equitable. An equitable recovery is analogous to a legal one: *Robinson v. Cummings*, For. 164; 1 Atk. 473; *Brydges v. Brydges*, *ante*, 120.

Dec. 3d. Lord CHANCELLOR [LOUGHBOROUGH]. This is a singular cause; and I am not sorry it has been re-argued; though my opinion does not differ *from what it was before. [*274] The cause has been much better understood; and it can be only from its not being understood, that any possible doubt could be raised.

The object of Mrs. Clarke's will was to provide for her sister Mrs. Becher and her niece Mrs. Abney. For that purpose she devised her third part of her father's estates to trustees, giving the whole legal fee to the trustees; and necessarily for the purpose of her

will, to divide the estate between her sister Mrs. Becher and her niece Mrs. Abney ; to carry on a strict settlement of the estate one moiety in Mrs. Becher's line, one moiety in Mrs. Abney's line, with cross-remainders between the children of each respectively, but no cross-remainders expressly between the separate branches of Mrs. Becher and Mrs. Abney. One trustee would not act. It was a complicated trust, and a good deal to be done upon it. Two questions arose. The cause was heard before Lord Hardwicke. From his notes I observe, the points, that arose, and which led to the directions, that were given by the decree, were, 1st, that the personal estate was exempt from the debts, annuities and legacies : 2dly, that there could be no cross-remainders between the two branches of Mrs. Becher and Mrs. Abney. Lord Hardwicke thought, that the personal estate was not exempt (1) ; and that there were to be cross-remainders between the two branches (2). One trustee declining to act, the decree directed, that new trustees should be appointed ; and then that the estate should be conveyed to the new trustees ; with a precise direction, that they should insert cross-remainders ; which were implied in the will, but not expressed.

The estate has been very unlucky ; for it has paid most abundantly to conveyancing. First they made the trustee, who would not act, execute a release to the other. Then they contrived, that the remaining trustee, to whom the other had released, should execute a bargain and sale to the new appointed trustee ; upon which bargain and sale they declared the uses to be in the new trustees. Then they found they had blundered ; and that no use could arise to the old trustee ; out of whom they had taken all the estate ; upon which they made the new trustee, in whom the use by the bargain and sale was raised, execute a bargain and sale to his co-trustee. Then having got the use back again in him by the bargain and sale executed by the statute, there was a conveyance by lease and release, upon which the trust was declared. The limitations upon

[*275] *the words of the will were quite out of the question ; a settlement was made with the approbation of the Master under the decree ; and the trusts were declared upon that settlement. Mrs. Becher chose to have the personal estate ; and to acquire it, she agreed to sell her undivided third of the estate, that she took by descent. Then deeds were executed by the trustees, reciting, that all the debts, annuities and legacies were paid, and that the clear residue of the personal estate was 4000*l.* ; and that was to be invested in land to the uses of the settlement ; that estate therefore was sold to the trustees by Mr. and Mrs. Becher ; and they convey that estate upon the trusts of the will. It stood then a trust completely executed as to any matter, as to which there was any activity : the personal estate converted into real estate ; and that conveyed, by certainly more conveyances than were necessary, finally to the trustees, in whom the legal fee was vested, upon trusts

(1) *Gray v. Minnethorpe*, ante, 103, and the note 106.

(2) See the note, post, 541.

distinctly declared : and the first trusts declared were as to one moiety, to Mrs. Becher (her moiety is out of the question) ; as to the other, to Mrs. Abney during her life, for her sole and separate use ; and nothing is left for the trustees to give them any interference with the estate but to receive and pay over to a married woman rents and profits, deducting their expenses : that is all : they are mere conduit pipes : they have nothing to do with repairs, &c. When they came to sell, Mrs. Abney had two daughters : there was no probability of any other children. One daughter married the Plaintiff Burnaby : one died leaving a son, the Plaintiff Swinfen.

In Mrs. Abney and Mrs. Burnaby and the grandson, the whole estate in equity was vested. Mrs. Abney and her husband convey by lease and release the interest she had : the daughter Mrs. Burnaby and the grandson were vouched ; and a recovery was suffered by her. The objections of the conveyancer are the most extraordinary, that can be conceived. He takes it for granted, that the decree was never executed. It was twice executed ; and by the accident of the change of the trustees there were two different formal conveyances, both under the direction of the Court and with the approbation of the master ; and the last was by a specific order of the Master of the Rolls. One trustee died : then the other died ; and he left two daughters ; upon whom the trusts devolved. An application was made to the Court, *that those daughters [*276] might convey to new trustees ; and by an accurate, formal, conveyance, settled by the Master, they did convey ; and the trust was then placed under the direction of the Court in the two Mr. Abneys. The conveyancer had inconceivably overlooked, that the decree was executed ; that the conveyance limited the estate, precisely with the limitations of the will, to Mrs. Abney for her life : no executory trust remaining : the trustee a mere conduit-pipe, as it is called, for a purpose expressly directed by the Court. But he does not rely upon that ; for he says, puzzling about it, that she had at most an equitable estate : he does not go so far as to say, she had no estate. He then makes another objection ; which is a whimsical one ; that there was no estate in her daughters ; because the estate, as he supposes, was not to be conveyed till after her death ; when it would appear, how many daughters she had. He does not conceive, that it would vest in each daughter coming *in esse*, subject to be divested, as the number increased ; nor that each daughter would take an estate tail, which would be barred by the recovery ; and he conceives, quite contrary to what is always done by this Court, that no conveyance was to be made to the trusts of the will till the death of the last tenant for life. He describes conveyances, that it was impossible to execute with the direction of this Court ; which would never have permitted the legal estate to be conveyed by the trustees to her, to give her husband a seisin in her right. It was argued, that she was in equity not to be considered as having an estate ; that she had only an equitable interest in the clear profits of the estate. What is that, when there was no other purpose, to which by

possibility it could be applied, but her use, what is that, but an estate for life? It was supposed to be necessary to give her power to dispose of it. She has under the will power to dispose to any purpose, she may think fit. There are but two species of estates; the legal and the equitable estate. It is an impossible argument, that she had no estate. She had an estate for life to be preserved by this Court. There never were more than two daughters: but if there had been more, it would not have made the recovery bad: but some other person would have come in for a share: but that objection was never made. In *North v. Champemoon*, the decree is plain; and, coupled with the argument in *Chancery Cases* a few pages before, it is very plain what Lord Nottingham meant: that for an equitable recovery there must be such an interest (1), as would be sufficient for a recovery of a legal estate. He guards himself against the supposition, that a mere estate-tail in this Court would be sufficient to suffer a recovery upon to bar remainders, where there is a prior estate for life.

He says, if there be a tenant for life, he must be a party; [*277] and there * must be a tenant to the *præcipe*: if there is no estate for life, the tenant in tail alone is sufficient. It had been disputed before his time I see. Probably the reason of the contest was what made that case of some importance and some note in the law. Prior to Lord Nottingham's time the question occurred several times. Lord Clarendon and the Master of the Rolls and the Chief Justice held, that an equitable recovery barred all equitable remainders. Lord Bridgman doubted: he thought, there could be no such thing. The Chief Justice and the Master of the Rolls and Lord Clarendon thought a deed would do. I do not know, why that was not adhered to, but that it makes more profit to the conveyancers. Lord Bridgman's doubt made it come before Lord Nottingham. He decided, that a recovery was quite sufficient; that there was no occasion to have an application to the trustees.

The exception must be over-ruled.

To the application for the deposit the Lord Chancellor answered, that the Defendant must pay the costs.

1. WITH respect to the validity of equitable recoveries, see, *ante*, note 1 to *Brydges v. Brydges*, 3 V. 123.

2. That an interest given by will may vest *sub modo* only, and subject to being divested; see note 3 to *Malim v. Keighley*, 2 V. 333.

(1) See *ante*, *Brydges v. Brydges*, 120, and the note 128.

DANIEL v. CROSS.

[1796, Dec. 6.]

BANKERS upon a deposit of money with them gave notes bearing interest: the partnership was dissolved: one of the partners soon afterwards died: and his creditors were called by advertisement: another partnership was formed by the survivors and others; who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years; when they failed: the assets of the deceased partner are not discharged. (a)

Cross the elder, Cross the younger, and Bayley, were in partnership as bankers at Bath. In March, 1791, the partnership was dissolved; and in June, Cross the elder died. By his will he subjected his real estate to his debts. After his death an advertisement was published, calling upon his creditors to send in the particulars of their demands to his executrix. In the same year a new partnership was formed by the surviving partners and other persons; which continued till March, 1793; when a commission of bankruptcy issued against them.

The Plaintiffs were creditors of the old partnership by notes issued in 1790 for money paid into the bank. These notes were made payable a certain number of days after sight: but it was understood, that they were to remain a longer time; and they bore an interest of 3 and a half per cent. The interest upon these notes had been paid by the new partnership; and they had re-issued several of the common cash notes of the former partnership. The debts of the old partnership at the dissolution, amounted to 197,000*l*. Their effects and money due to them were calculated at 203,000*l*.

*The question was, whether the estate of Cross the [278] elder was liable to the Plaintiffs in respect to their deposit notes.

Solicitor General [Sir John Mitford], for the Plaintiffs. Lane v.

(a) It frequently happens, that upon the retirement of one partner, the remaining partners undertake to pay the debts and to secure the credits of the firm. If the arrangement is made known to a creditor, and he assents to it, and by his subsequent act, or conduct, agrees to consider the remaining partners as his exclusive debtors, he may lose all right and claim against the retiring partner, especially if the retiring partner will sustain a prejudice, and the creditor will receive a benefit from such act, or conduct. Story, *Partnership*, § 158, and cases cited; *Thompson v. Percival*, 5 Barn. & Adolp. 595; *Oakley v. Pasheller*, 10 Bligh, 548; *S. C.* 4 Clarke & Fin. 207; *Harris v. Lindsay*, 4 Wash. Circ. 271; *Hart v. Alexander*, 2 Mees. & W. 484. But the mere fact of the creditor's taking an additional security from the new firm without surrendering the old, or of his receiving interest from the new firm, without varying from that due on the old debt; or of his acquiescing in delay, without contracting upon any new consideration to prolong the credit, will not absolve the retiring partner from his original responsibility. *Ibid.* *Featherstone v. Hunt*, 1 B. & C. 113; *Bedford v. Deakin*, 2 B. & Ald. 210; *Harris v. Lindsay*, 4 Wash. Circ. 271; *Blew v. Wyatt*, 5 Carr. & P. 397; *Smith v. Rogers*, 17 Johns. 340. All these cases turn upon the same general consideration: whether there has been a new and exclusive credit given to the new firm in extinguishment of the debt, or to the prejudice of the firm.

Williams, 2 Vern. 277, 292. *Heath v. Percival*, 1 P. Will. 682. *Jacomb v. Harwood*, 2 Ves. 265. In *Jones v. Sutton*, Chan. before Lord Hardwicke, 2d of January, 1753, mss. after the death of one partner another was taken in, and the debts were carried into the new partnership: the decision recognizes the distinction; that to relieve the estate of the deceased partner from debts of this nature it is absolutely necessary, that the notes should be called in and delivered up, unless a prodigious length of time has elapsed.

Mr. *Mansfield* and Mr. *Richards*, for the Defendants. Another partnership having been established, and having paid interest upon these notes, and re-issued notes given by the former partnership, the attempt to charge the estate of a former partner is new. When he died, the old partnership was solvent. The dissolution became by his death notorious to all the world. The Plaintiffs never thought of making a demand when the advertisement appeared upon the death of Cross; and they dealt with the new partnership. This is not like the case of a bond or an express engagement by two partners. *Lane v. Williams* is a very short note: there was no new partnership or new credit given. In *Heath v. Percival* there was a joint and several bond. In *Jacomb v. Harwood* the interest was paid by the representative of the deceased partner (1). In *Jones v. Sutton* Lord Hardwicke relies upon the circumstance, that the surviving partner was executor of the deceased partner, and the interest was paid by him. If persons interested in the estate of Cross knew these notes were out, they must have supposed the claim abandoned. The new house took upon them the debts of the old; paying interest to the Plaintiffs, and renewing the cash notes from time to time.

Reply. The interest might have been paid by the new firm as agents of the old firm. As to their solvency at the dissolution, the debts nearly equalled the amount of their effects; and *non constat*, that all the money due to them could be recovered.

[*279] *Lord CHANCELLOR [LOUGHBOROUGH]. These notes I take to be securities for money borrowed by the partners (2): then how can receipt of interest from the surviving partner, no matter whether a new partnership or not, discharge the estate of the deceased partner? I do not apprehend, they could come upon the new partnership, or that the creditors of the new partnership would permit them. They come quite regularly upon the assets of Cross possessed by the new partnership, and upon his general assets. They are creditors upon the effects of the old partnership, not upon the effects of the new partnership. The effects of the old partnership are the effects of Cross, and part of the effects of the new partnership. Cross's assets can never be discharged from this demand (3).

If one member of a banking firm retire, or die, a customer, by continuing to deal with the remaining partners, is not necessarily to be understood as accepting

(1) The surviving partner was one of the executors; and the interest was paid by him.

(2) The Counsel for the Defendant admitted, that in effect it came to a loan.

(3) *Devaynes v. Noble*, 1 Mer. 529.

them for his sole debtors, in respect of demands which arose previously to the retirement, or death, of the other partner: making the surviving partners debtors for new sums, is no acquittal of the old debtor; the estate of the retired, or deceased, partner remains liable to the debts which affected him at the time of death, or withdrawing from the firm. *Palmer's case*, 1 Meriv. 624; *Sleech's case*, ibid. 565; *Fulliamy v. Noble*, 3 Meriv. 619. Such subsequent dealings, however, may be of a nature to exonerate the estate of the retired partner. *Ex parte Kendall*, 17 Ves. 519, 526.

MOSS v. MATTHEWS.

[1796, Nov. 29; Dec. 9.]

THE bill praying an inquiry into the title, and a specific performance, on the Defendant's motion after answer, an inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient: but the Court would not decide upon any matter of relief.

Relief against forfeiture of the deposit upon putting the other party in the same situation as if the contract had been performed at the time agreed, [p. 282.]

AN Act of Parliament had been obtained in the last session for the sale of a devised estate, under the direction of the Court upon the report of the Master, that it would be for the benefit of the infant devisees. Accordingly by articles dated the 30th of June, 1796, Moss contracted with the trustees for the purchase of the freehold and inheritance for 24,000*l.*, making a deposite of 2400*l.*; the purchaser to be let into possession the 10th of October following; and he covenanted, that in case of default in payment of the residue of the purchase-money upon the 5th of November, 1796, the deposite should be forfeited, and the contract should be void at law and in equity, and the trustees should be at liberty to re-sell the premises; and the deficiency at such sale, and all costs, charges and expenses, attending the same, should be defrayed by Moss, his heirs, executors, and administrators. The abstract of the title was delivered on the 28th of July. The remainder of the purchase-money was not paid. On the 7th of November the purchaser filed a bill, stating, that he found objections to the title; and particularly, that the tenants are entitled to take the crops of corn and grain, which should be produced in the season next ensuing the determination of their takings, interests or agreements, and after having quitted the same. The bill prayed an inquiry, whether the Defendants can make a good title, and what will be a proper deduction *in respect of the [* 280] loss, that will be sustained by the Plaintiff in respect of the adverse rights of the tenants; and in case such title can be made out, and upon having such allowance made, the bill prayed a specific performance: but if the title cannot be made out, or the Defendants refuse to make such allowance, then that the deposite may be returned, and the agreement cancelled. The answer stated the delivery of the abstract; and that the Defendants desired, that

if any explanation was required, they might hear from the Plaintiff's solicitor: that they made several applications to the Plaintiff's solicitor; to which no answer was returned: at length a meeting took place; and the Plaintiff's solicitor acknowledged, that the money was not ready; as two persons concerned with the Plaintiff in the purchase were not ready with their proportions; and after the bill was filed, the Plaintiff informed the Defendants, that the money was not ready. The Defendants had given notice to the creditors of the devisor, that they would pay them 7000*l*.

Attorney General [Sir John Scott], and Mr. *Hubbersty*, for the Defendants, moved, that it might be referred to the Master to inquire, whether the abstract was delivered, and when, to the Plaintiff or his solicitor: and whether in time for his using reasonable diligence to be enabled to have prepared his conveyance and completed his purchase within the time limited; whether any and what steps have been taken by the Plaintiff or Defendants towards completing the purchase; and if the Master shall be of opinion, that such abstract was so delivered, that the Defendants may be at liberty to retain the deposit-money, and to re-sell the estate according to the terms of the contract; and that the costs of such reference, and of this application may be paid by the Plaintiff, and that his bill may be dismissed with costs.

Solicitor General [Sir John Mitford], and Mr. *Wetherell*, for the Plaintiff. This application is totally against practice. It is a motion by the Defendant upon the foundation of his answer to stop the cause, and have a decree of his own choice. He will not submit to the decree prayed by the bill, but desires another. It is an established rule, that the Court will not make a decree upon motion. Lord Thurlow in such a case said, it would bring the Court under the necessity of discussing the merits of the cause upon motion without evidence. This condition is in every sale by auction.

[*281] *Lord CHANCELLOR [LOUGHBOROUGH]. You pray by the bill, that it may be referred to the Master to see, whether a good title can be made. Can a person, who is a purchaser, and has filed a bill for a specific performance and an inquiry as to the title, object to the Defendant's coming into Court and concurring with him in that reference? Shall I enable him to run the whole course of proceedings, till the cause is fit to be heard, upon the simple question of a reference to the Master, in which the Defendant agrees? I see no objection to a reference to a Master as to a good title: all the rest is more, than I can do upon motion: but I have no objection to add an inquiry, when the abstract was delivered. I do not mean to make any order, that shall import any decision upon the cause: but if the purchaser means fairly, it is impossible he can object to this. I am not now taking up the consideration of the forfeiture. Adding an inquiry, at what time the abstract was delivered, ascertains a point in the cause in the only way, in which it can be ascertained. I do not preclude you from reasoning upon the point of compensation. I am not going into the circumstances, whether material or not. You have a right to be heard upon them, however

immaterial: but you have no right to delay. I do not make a decree, nor stop the proceedings in the cause: but by this inquiry I ascertain two points, both material, which it is obvious can only be ascertained by the report of the Master. I do not by this order prejudice the question of compensation; which is perfectly collateral: but I will not suffer this person, having entered into such a contract for a purchase, to speculate upon the presumption, that the Court will afford him as long a time as he pleases for the payment of his money.

Refer it to the Master to inquire, whether a good title can be made, and at what time the abstract was delivered, and whether the abstract delivered was a sufficient abstract (1).

An order, that the Master should proceed *de die in diem*, was obtained upon the motion of the Defendants, opposed by the Plaintiff.

The report stated, that the Defendants can make a good title; and that an abstract of a good title was delivered in due time: namely, upon the 28th of July. The Plaintiff did not attend before the Master.

* Upon the report and affidavits the motion was renewed, [*282] that the Defendants might retain the deposit and re-sell the estate; that the bill might be dismissed with costs; and that the costs of the reference and of all the applications might be paid by the Plaintiff.

The motion was supported by affidavits of the facts stated by the answer; and that Parkinson, one of the persons concerned with the Plaintiff in the purchase, had been employed in parcelling out the estate, and knew the right of the tenants to the way-going crops, and that it was the custom of the country; and that he had perfectly informed himself on the subject.

The affidavits for the Plaintiff stated, that he made the purchase upon the persuasion of Parkinson and another; who were to be interested with him in thirds; and that he was ready with his money; but they were not.

For the Plaintiff it was said, that the bill was proper, as they insisted on retaining the deposit: but they could only insist on being

(1) This practice is limited to cases, where the title only is disputed, and the decree depends on a simple fact: therefore not applied to cases of account, fraud, &c. See, *post*, *Wright v. Bond*, vol. xi. 39; *Gompertz v. —*, xii. 17; *Eldridge v. Porter*, xiv. 139; *Fullagar v. Clark*, xviii. 481, and the note 482; *Blyth v. Elm-lord*, *Balmanno v. Lunley*, — v. *Skelton*, 1 Ves. & Bea. 1, 224, 516; *Dixon v. Auley*, xix. 564; 1 Mer. 133, 378, n. In these two last cases this order was made before answer. *Lowe v. Manners*, 1 Mer. 19; *Morgan v. Shaw*, *Birch v. Haynes*, 2 Mer. 138, 444; *Brooke v. Clarke*, 1 Swanst. 550; *Boehm v. Wood*, 1 Jac. & Walk. 419; *Matthews v. Dana*, 3 Mad. 470; *Anon.* 3 Mad. 495, before answer. *Withy v. Cottle*, *Gordon v. Ball*, 1 Sim. & Stu. 174, 178; 1 Turn. 78. The title being denied by the answer, in the Exchequer this practice does not prevail without consent; *Bowyer v. Bright*, 3 Pri. 300. After this reference on motion the farther directions may also be obtained by motion: *Whitcomb v. Foley*, 6 Mad. 3. Whether the order in the first instance should go farther than the mere question of title, see *Gibson v. Clark*, 2 Ves. & Bea. 103, and the note 104, 2d edit. and *Jennings v. Hopton*, 1 Mad. 211.

placed in the situation as if the contract had been performed at the time ; it was a mere forfeiture *nomine pœne*.

LORD CHANCELLOR [LOUGHBOROUGH]. That is very clear : but there is this circumstance ; that you waited till the day the forfeiture was incurred, and kept the bill in your pocket to have that protection.

An offer was then made by the Plaintiff to pay the remainder of the purchase-money at Lady-day, either, at the option of the Defendants, in money with interest from the 5th of November, 1796, or in stock, to be computed according to the value of stock at that time, with the dividends, that would have accrued ; and to pay all the costs attending the transaction.

LORD CHANCELLOR. The offer I think a good one ; because it comes very near what would be the ultimate justice of the case. It will place the Defendants in the same situation, as if the contract had been performed on the 5th of November. I think, they cannot be hurt by it ; and there must be a little consideration for the Plaintiff. I shall make the order accordingly ; adding only this term ; that in default of performing the alternative the bill shall be dismissed with costs : then the Defendants will have the deposit, and may re-sell the estate.

As to the practice of directing a reference to the Master, when, upon a bill for specific performance, the only question is, whether the plaintiff can make a good title ; see, *ante*, note 6 to *Cooper v. Denne*, 1 V. 565.

[* 283]

MITCHELL v. BOWER.

[1796, Dec. 9, 12, 14.]

UPON the ground of an express maintenance and other indications of the intention, the Lord Chancellor inclined to the opinion, that the rule for interest upon a legacy, given by a parent to a child, till the time of payment was not applicable : but the bill of the children was dismissed upon circumstances of acquiescence, laches, and the consequent difficulty of taking the accounts. (a)

Portions under a settlement for younger children were increased by the will of the father : there being an express maintenance of 2 per cent. upon the original portions, the rule for interest upon the legacies does not apply : but the Court continued the 2 per cent. upon them, [p. 286, note.]

Interest by way of maintenance upon a legacy in the case of parent and child only, [p. 287.]

JOHN BOWER by his will, appointing his wife Jane, his brother Samuel and Benjamin, and Richard Milnes, joint-executors, gave to his daughter Jane Bower the sum of 2000*l.*, and to the infant, with which his wife was then with child, 2000*l.* : which 2000*l.* each he directed to be paid them upon their attaining the age of twenty-one

(a) As to the interest on legacies, and particularly where it is allowed by way of maintenance of children, see *ante*, p. 10, note (a) to *Crickett v. Dolby*.

or upon their marriage ; with survivorship between them in case of the death of either before the time of payment ; and in case of the death of both before the time of payment he gave the said two sums to his sons Jeremiah and Samuel Bower. He gave all the remainder and rest of his personal estate and effects to his sons Jeremiah and Samuel ; to be paid them upon their attaining the age of twenty-one years, share and share alike. Then appointing his said executrix and executors joint-trustees for the direction of and paying his several children their respective fortunes upon their several attainment to the age above specified he declared, that it was his request, that his said wife should keep house after his decease, and that all his children should live with her, till they arrived of age, or the daughter or daughters be married ; and that she should receive and be paid every year for their education and maintenance the sum of 50*l.* a piece from every child's respective fortune ; and he desired, that a settlement should be made every 1st day of January of the whole : and that the same should be specified in a paper drawn up and signed by every one of his executors and executrix.

Soon after the execution of the will the testator's wife was delivered of a son, John Bower. The testator died in 1770. His two eldest children Jeremiah and Samuel lived with their mother, till they attained the age of twenty-one : the two youngest John and Jane lived with her till her death in 1785 ; at which time Jane was of the age of nineteen, and John was seventeen. A settlement took place in 1775 between the widow and Benjamin Bower, the brother and surviving partner of the testator ; who took to himself the stock and the debts due to and from the partnership ; and gave a bond to the other executors for 13,379*l.* 12*s.* 2*d.*, the balance awarded by those, who audited the partnership accounts. In 1779 Benjamin Bower in consequence of the troubles in America became bankrupt, after having paid 9200*l.* upon his bond. When the residuary legatees attained the * age of twenty-one, the executors, retaining a sum sufficient to answer the legacies of [* 284] the two younger children and the annual sum of 50*l.* for the maintenance of each, while under the age of twenty-one, delivered what remained to the residuary legatees. The mother received 50*l.* a year each for the maintenance of her children, while they lived with her ; and after her death that sum was annually paid to John and Jane Bower, while they continued under age. The son went into the army ; and each of them upon attaining the age of twenty-one received the legacy and executed a release.

Jane Bower married ——— Mitchell ; and in 1794, Samuel and Benjamin Bower the acting executors being dead, the bill was filed against the residuary legatees and Richard Milnes, the surviving executor, by Mitchell and his wife and John Bower, claiming interest upon their legacies from the death of the testator to the time, when they were paid, and that the releases might be set aside : submitting to allow what had been paid on account of maintenance and education.

The bill charged, that when the Plaintiffs received their legacies, the Defendants assured them, they were not entitled to interest ; and that the opinion of Counsel had been taken, and was against the claim. The Plaintiffs also charged, that they signed the releases, the Defendants refusing to pay the principal to them, unless they would do so.

The Defendants read evidence, that the Plaintiff Jane from the age of fifteen or sixteen till twenty-one expressed in various conversations the hardship of the interest not being intended to be paid ; and one of the deponents expostulated with her for being unreasonable ; as the property of her father had been impaired by losses. About four years after she attained twenty-one on her return from London she mentioned, that she and her brother had taken Counsel's opinion upon their right ; and she declared, she thought, he had a right to interest ; and she asked her aunt, one of the deponents, for a copy of her father's will ; and after perusing it she declared her opinion, that her father did not intend them to have interest ; but if they could get it, they thought, they ought to try for it.

Attorney General [Sir John Scott] and Mr. Scafe for the Plaintiffs relied on the general rule, that a legacy given as a [*285] portion by a parent to a child, payable at a future day, without any direction as to interest, carries interest by way of maintenance. They insisted, that under the circumstances the releases ought to be set aside.

Solicitor General [Sir John Mitford] and Mr. Campbell, for the Defendants. The rule in this case is to give interest by way of maintenance, not as interest ; and it does not apply, wherever there is a provision for maintenance ; particularly a limited sum. The Court has always proceeded upon the ground stated in *Heath v. Perry*, 3 Atk. 102 ; that in the case of a child, let the testator give the legacy how he will, "either at twenty-one or at marriage, or payable at twenty-one or payable at marriage, and the child has no other provision, the Court will give interest by way of maintenance ; for they will not presume the father inofficious, or so unnatural as to leave a child destitute."

The principle therefore for the Plaintiffs must be, that they are to have a maintenance : but the testator having provided a maintenance has not left them that inference ; and they must insist on an intended accumulation. In looking through the cases I do not find when it was first determined, that a legacy by a parent to a child, payable at a future day, should carry interest, though not expressly given. The first place in which it is mentioned, is *Chambers v. Cotchett*, Freem. C. C. 116, a book of no great authority : but it appears from the *Attorney General v. Thompson*, Pr. Ch. 337, to have been the settled rule of the Court in 1712 : the same case is in 1 Eq. Ca. Abr. 301, in nearly the same words ; which induces one to think, as it is generally supposed, that the author of 1 Equity Cases Abridged and of Precedents in Chancery is the same person. In *Greenhill v. Waldo*, Pr. Ch. 367, there is the same doctrine, and in *Har-*

vey v. Harvey, 2 P. Will. 21. In *Dormer v. Tomlinson*, 4th of June, 1733, the testator gave a legacy of 100*l.* to a daughter; who brought her bill for the legacy; and the Court decreed the same with interest from the death of the testator: *ms. note of Mr. Capper*. Then came *Palmer v. Mason*, and *Green v. Belchier*, 1 Atk. 505; which are not immediately upon the point; but in the latter the rule is expressly laid down. In *Hearl v. Greenbank*, 3 Atk. 695, 1 Ves. 298, there being an express provision for maintenance, it was held, that the usual principle did not apply.

* In *Long v. Long*, where less interest than 4 per cent. [*286] was given, your Lordship would not give more (1).

As to the releases, when the daughter attained the age of twenty-one in 1786, the question of their title to the interest was agitated. It is clear, she was aware, that question might be raised. The Court

(1) *Long v. Long*, Chancery, 14th November, 1796, upon exception to the Master's Report allowing interest upon the additional portions. By the settlement, made in 1785, 15,000*l.* was secured to the younger child or children of Sir James Tilney Long, if more than one to be divided at such times and in such proportions and subject to such provisos and limitations as Sir James Tilney Long should by deed or will direct, and in default thereof at twenty-one, or marriage of the daughters; with power to raise for maintenance and education such yearly sums as should amount to the interest of their respective portions, not exceeding 2 per cent. per annum, till they should respectively attain the age of fifteen, and afterwards at 4 per cent. until the portions should be payable, with benefit of survivorship. In 1793, Sir James Tilney Long by his will, reciting his power of appointing the 15,000*l.*, appointed it among his children in manner following: in case he should have an eldest or only son and one or more child or children, then he appointed the said sum of 15,000*l.* unto and among such child and children other than such eldest or only son equally, if more than one; if only one, the whole to such one; and if daughters and no son, then as in the will mentioned; and he directed, that the portions of his said children respectively should be paid at such ages, days and times, and with such maintenance in the mean time, as was directed by the settlement, in case of no particular directions by him; and he declared, that in case he should have more younger children than one, the fortune or portion, which each of such children would be entitled to under the appointment therein before made, should be increased to 10,000*l.* it being his intention, that the fortune of every such child should be increased to 10,000*l.*; and he directed, that such additional fortune should be paid to his said children respectively at the same ages, days and times, at which their respective shares of the said 15,000*l.* would respectively become payable; and he devised all his estates in the counties of York and Northampton for securing (*inter alia*) the payment of the said additional fortunes. The testator left one son and three daughters.

The younger children pressed for interest at the rate of 4 per cent. upon the additional portions. On the other side it was contended to be an increase of capital only.

The Lord Chancellor held, that the two per cent. should be continued upon the increased capital.

As to the general rule his Lordship expressed himself thus:

"I take the rule of the Court to be, that in case of a legacy to a child, payable at twenty-one or marriage, if there is no provision, the Court will raise interest to supply what it is quite fair to construe a mere mistake. It is the duty of the parent to maintain the child: that he meant to execute it, is proved by the legacy. But I do not believe, a case can be found, where, the child having a provision, the Court has conceived that rule to apply; and a provision upon the circumstances such as is equal to maintain the child. The rule standing so, generally, I think I should be establishing a new precedent by giving 4 per cent. upon the additional 5000*l.*"

favours such agreements in a family. *Stapilton v. Stapilton*, 1 Atk. 2: *Pullen v. Ready*, 2 Atk. 587.

Reply. The testator meant the same thing as to the interest of the legacies to these children, as he meant with respect to the interest of the residue given to his two eldest sons. If the mother had lived, she would have had 50*l.* a year from each of them. Suppose an application had been made to the Court upon her death, there must have been an appropriation of the legacies; which would have determined this question. It would have been impossible to contend, that they would not have been entitled to the surplus of the interest upon that appropriation.

Upon the second point, the principle is fairly laid down in *East v. Thornbury*, 3 P. Will. 126. The party releasing must mean to part with a right, he has, or to waive his claim, where he doubts, whether he has a right or not.

[*287] Lord CHANCELLOR [LOUGHBOROUGH]. If there is any obscurity in the transaction, they must take it to themselves for not bringing the bill sooner. I much doubt whether there could have been an appropriation, upon the particular penning of this will; which gives an absolute discretion to the executors to continue all the fortune in trade and to make up annual accounts. In *Hearl v. Greenbank* this was one of the points made. The peculiarity of this will is, that there is a clause of survivorship between these legatees upon the death of one before the time of payment: if both should die, their legacies are given over to the two eldest sons, and in effect fall into the residue. Supposing 4 per cent. to be taken as the rate, in the case I put of the death of one, what is to become of that ultra the 50*l.*? Would it go to the survivor, or be part of the estate of the deceased child? It requires a great deal more of expression in the will to make it follow the principal. It is clear, the testator knew, there would be a saving of that interest; and at the same time it is perfectly clear, nothing could vest in any of the children to bar the survivorship.

Dec. 14th. Lord CHANCELLOR [LOUGHBOROUGH]. The claim made by this bill is for interest upon two legacies of 2000*l.* each given by the will of a father to a younger child, and to one, of whom he supposed, as the fact was, that his wife was then *enciente*; who is the Plaintiff John Bower. The claim is made on the foundation of that rule of the Court, by which interest is allowed by way of maintenance in the case of a legacy given as a portion by a parent to a child; and the rule goes no farther than the case of parent and child (1); and in the cases, in which the Court has allowed that, it has proceeded upon the ground of a very natural presumption, that a father bound by natural duty to provide for the child, giving a legacy to that child, though he postponed the payment to a distant period, commonly the age of 21 or marriage, could not but intend, that that child should be maintained: and therefore the Court gives

(1) *Crickett v. Dolby*, *ante*, 10, and the notes, pages 12, 13.

the interest, where there is an omission of any direction as to interest; and gives the interest for the maintenance.

In *Hearl v. Greenbank*, which was a very favorable case, as far as favor can weigh and raise an inclination in the Court, Lord * Hardwicke upon the ground of an express maintenance [* 288] marked out for that child did not hold, that the general rule of the Court could apply; for giving an express maintenance barred the presumption, that an indefinite maintenance was intended; and barred the Court therefore from exercising that authority, it does exercise, to take according to the rate of interest the fund of interest for the maintenance of the child. The circumstances of that case were such, as would have induced the Court, if it had not been necessary to limit the doctrine, to give the child as much, as it could. The portion moved from the mother. The father ran away with her; and soon afterwards was separated from her; and all the fortune came from the mother's relations. She conceived, she had a right to dispose of a considerable real estate. She certainly had a right to dispose of her money; and she appointed 8000*l.* to this child. She could expect very little support from her father. The disposition failed as to the real estate. The mother had also provided maintenance at different periods according to the age of the child; and she gave away from the child the residue of the fortune: but Lord Hardwicke thought, where an express maintenance was provided, it was out of his power to raise the interest as a fund for maintenance (1).

If it was necessary in the present case to decide upon the will, I should be inclined to hold, that the testator intended, nothing more should be taken out of the bulk of his fortune for the children, till the portions were payable, than the 50*l.* It goes alike to all the children. The two eldest sons, to whom the residue was given, he meant to continue the trade. To the two younger children, one not then born, the other very young, he gave defined portions. He left all the administration of his affairs to his wife and two brothers; one of whom was his partner. He gave them the care and management of all his children; and this circumstance occurs; that with regard to these two portions of 2000*l.* there is survivorship between them, if one dies before 21 or marriage. It is quite clear, he intended, all he gave to that one, should go over to the other in case of death before 21 or marriage: but if the interest is allowed upon that, that interest necessarily would become part of the personal estate of the child dying. But it is not necessary to determine * the point upon the construction of the will merely. [* 289] I throw it out as a point, that might have been liable to a great deal of doubt, and was open to great argument: but these circumstances have occurred. The mother died. The children fall

(1) *Ante*, 17. See *Bourne v. Tynde*, 1 P. Will. 786. That case however met with some degree of disapprobation from Lord Hardwicke in *Heath v. Perry*, 3 Atk. 103.

under the care of the uncles. Each attains the age of 21; and with regard to the eldest of them, this question having been distinctly agitated in the family, she frankly settles an account with her uncles, and gives a full release. Two years afterwards, when the son, who went into the army, came of age, the same thing was done with respect to him. It is clear, both of them had been maintained. If I was of opinion, that they were entitled to the interest, I should be under the necessity in decreeing the interest to them to give a direction to inquire by whom they had been maintained, and what had been expended in their maintenance; and that account being had, if the expense had *de facto* cost more than the 50*l.* a year, there must have been a deduction from the 80*l.* a year, the interest of their legacies. It is almost of necessity to suppose, more than 50*l.* a year was expended as to the son, who went into the army; and most probably as to the daughter. But both being educated and maintained, and an account settled with their near relations, their uncles, the guardians appointed by the father, they come at the distance of eight years from the time the daughter came of age, and make this demand. They filed no bill, till both the uncles are dead. In strictness I should have been obliged to direct that inquiry, and to have made a deduction, if more than 50*l.* had been expended. That inquiry is now totally impossible. Upon that ground therefore the bill ought to be dismissed. I do not think, it is a case for costs.

THAT interest upon a legacy can be allowed, by way of maintenance, only when the legatee is the infant child of the testator; or when such testator, though not actually the parent, has put himself in *loco parentis*; see, *ante*, the notes to *Crickett v. Dolby*, 3 V. 10.

ALLEN v. CALLOW.

[ROLLS.—1796, DEC. 15, 19.]

THE rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence of an intended substitution. (*a*)
 Legacy to A., in case she shall be living with the testatrix at her decease, with limitations over upon the death of A. before twenty-one or marriage, fails by the death of A. in the life of the testatrix, [p. 294.]

ELIZABETH METCALF by her will, dated the 1st of April, 1774, gave to Thomas Taylor and John Rushworth the sum of 500*l.* to be invested in the public funds in trust to pay the interest to Elizabeth Bousfield for life for her sole and peculiar use; and from and immediately after her decease to transfer the principal to and among all

(*a*) See 2 Williams, Executors, 925; see also, *ante*, note (*a*) to *Moggridge v. Thackwell*, 1 V. 464; *Ricketts v. Livingston*, 3 Johns. Ca. 101; *Dewitt v. Yates*, 10 Johns. 158.

and every the child and children of Elizabeth Bousfield living at her decease, and to the child and children of any deceased * child or children, to take the shares of the deceased [* 290] parents ; and if she should die without leaving issue, then to transfer the same to and among all and every her brothers and sisters living at her decease ; and similar legacies were given for the benefit of the two sisters of Elizabeth Bousfield and their children. The testatrix gave to Jane Ward the sum of 500*l.* in case she should be living with her at her decease ; otherwise that sum was directed to become part of the residue of her personal estate. Then reciting that " Catherine Hobbs, an infant, resides with me now, in case the said Catherine Hobbs shall happen to be living with me at the time of my decease, but not otherwise," she gave to the trustees the sum of 500*l.* in trust to lay out the same in the funds, and to pay the interest for the maintenance and education of Catherine Hobbs, and to transfer the principal to her at her marriage or age of twenty-one for her own benefit ; with limitations over to her father and mother and their children in case of her death under twenty-one and unmarried. '

Codicil dated the 23d of April, 1776. " Whereas I have by my said will given Miss Jane Ward, who then resided with me as a companion, 500*l.* in case she should happen to be living with me at the time of my decease ; but the said Jane Ward having left me, that legacy is at an end ; and I do hereby revoke the same ; and instead thereof I do give the like legacy or sum of 500*l.* unto Miss Sarah Allen now residing with me as a companion, in case she shall be living with me at the time, but not otherwise ;" and in case Sarah Allen should not be then living with her, she gave that legacy over. Then reciting the legacy given by the will for the benefit of Catherine Hobbs, she gave the trustees " the farther sum of 500*l.* upon the like trusts for the benefit of the said Catherine Hobbs, to be paid her at such time and manner as the sum of 500*l.* before mentioned is by my will directed to be paid to her ;" and in case of her death before she is entitled to receive the additional sum, then upon the same trusts and for the same persons, as directed by the will concerning the legacy of 500*l.* thereby given.

Codicil dated the 10th of March, 1780. The testatrix recites the legacy given by her will, in case Catherine Hobbs an infant " shall happen to be living with me at the time of my decease, but not otherwise ;" and the legacy " of the farther sum of 500*l.*," given by the codicil upon the like trusts ; and she confirms the said several * bequests of " the said several sums of 500*l.* and [* 291] 500*l.* making together 1000*l.*" She then declares the trusts of the said fund for the benefit of Catherine Hobbs till her marriage ; and after her marriage for the benefit of her and her husband and children ; and if she should die without leaving issue, then upon the trusts declared by the will and codicil as to the said several sums.

Codicil dated the 21st of May, 1785. The testatrix gave to

Sarah Allen "the legacy or sum of 300*l.* over and besides the legacy or sum of 500*l.* I have given to her in and by my codicil, dated the 23d day of April, 1776, in case she should be living with me at the time of my decease, but not otherwise." She then gave and bequeathed "to the three children of Elizabeth Bousfield now deceased the legacy or sum of 500*l.* in manner and proportions following:" viz. 200*l.* to her daughter Catherine Bousfield, 150*l.* to her son Thomas Bousfield, and 150*l.* to her son George Bousfield; payable at their respective ages of twenty-one years; with benefit of survivorship upon the death of any under that age; and she directed that the said 500*l.* should immediately after her death be vested in the said Thomas Taylor's name as a trustee, to be laid out by him for the use of the said legatees in some of the public funds in manner and for the purposes therein mentioned.

Codicil dated the 9th of November, 1789. The testatrix gave to her trustees 2200*l.* New South Sea Annuities upon trust out of the dividends, interest, and produce to pay to Sarah Allen "in case she shall be living with me at the time of my decease, one annuity or yearly sum of 52*l.* 10*s.* during her natural life;" and subject to the said annuity and another she directed the said 2200*l.* to become part of the residue of her personal estate.

Elizabeth Bousfield died on the 15th of July, 1782, leaving four children; namely Thomas, George, Catherine Ann, and Harriet; who were all living at the date of the will. Upon the 22d of December, 1782, Harriet died an infant and without issue. Thomas died an infant and without issue upon the 26th of December, 1789. The testatrix died upon the 5th of April, 1794; at which time George Bousfield and Catherine Ann Bousfield were the only surviving children of Elizabeth Bousfield. Sarah Allen survived the testatrix, and lived with her till her death. Upon the death of Sarah

Allen the bill was filed by her executors against the executor [*292] and residuary *legatee of the testatrix; and the facts appearing on the Master's report, the cause came on for farther directions.

Catherine Hobbs died in the life of the testatrix: but that did not appear by the report.

The questions made were, 1st, whether the surviving children of Elizabeth Bousfield were entitled to two legacies of 500*l.* or to a single legacy only: 2dly, whether the legacies to the family of Hobbs could be established in the event that had happened.

Mr. Lloyd for the Plaintiff, Mr. Piggott and Mr. Hart, for the residuary legatee. Upon the whole of this will and these codicils it is clear, that the legacy to the Bousfields by the codicil of 1785 is only a substitution for that given by the will. *Hooley v. Hatton*, *Ridges v. Morrison*, 1 Bro. C. C. 389, 391. *Coote v. Boyd*, 2 Bro. C. C. 521. *Moggridge v. Thackwell*, 3 Bro. C. C. 517. *ante*, Vol. I. 564 (1). *Conolly v. Lord Dartmouth*, and *Bell v. Conway*,

(1) See the references in the note, 466.

before the present Lord Chancellor, 7th May, 1796. The circumstances of these legatees had varied between the execution of the will and of the codicil. Where the testatrix meant to give additional sums she has clearly expressed that intention.

Mr. *Graham* for George and Catherine Ann Bousfield. The will and codicil are perfectly distinct instruments. The interval between them was eleven years. The state of the family was much changed. The dispositions by the will and codicil are very different. There is nothing to take it out of the general rule established by the cases, that legacies by different instruments are presumed accumulative; and the *onus probandi* lies on the other parties.

Dec. 19th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I mention the first codicil, executed in 1776, in order to remark, that in that first codicil the testatrix takes notice of a legacy, she had given by her will, and there adding to the legacy given by the will she gives expressly and *eo nomine* a farther legacy to the same person. That is not an insignificant circumstance: but it is not decisive; for the same thing was done in one of the codicils in *Hookey v. Hatton*: but it does strengthen the argument of those, who contend, that one of these dispositions is substituted for the other. By the second codicil she does not augment any of the legacies. The question arises upon the third codicil. The *alterations, that took place between the execution of the [*293] will and of that codicil, are material. The legacy given by the will is not given to any of these persons as *personæ designata*, but in the character of children living at the death of their mother, in case at that time they should sustain that character. It is therefore only to such persons as should be living at the death of Elizabeth Bousfield; which the testatrix supposed would be posterior to her own. It is necessary to consider, what would have been the effect of this legacy, supposing the testatrix, not acting upon the circumstances, that happened, had permitted the will to remain unaltered. I am willing to admit, that the death of Elizabeth Bousfield in her life would not have defeated the legacy to the children: though it was prospective, yet it would have vested in them; and the share of one of them dying in the life of the testatrix would have fallen into the residue as lapsed; and then each of the survivors could have taken only one fourth. Under these circumstances she is called upon to make a fresh disposition: an event happened, that would have had the effect of taking away the full benefit of the 500*l.* which she intended these children to have among them: for each would have taken only one fourth of that sum; and she sits down to consider what to do for them. Am I to suppose, she forgot her will? It is impossible not to suppose, she fully contemplated the situation of the family, and the operation of the will under the circumstances, that happened. After having in the former part of this instrument, where she meant addition, said so, she is supposed to contemplate, that meaning the 500*l.* given by the will still to remain a legacy, one fourth having lapsed, she gives by the codicil the

very same sum to the three children, the only children then living; though they with one other had been the children living at the death of Elizabeth Bousfield. It is impossible to suppose, she could have meant any thing more than a distribution of that same sum in such manner, that the whole might be enjoyed by the three children. It must not be forgot, that though it is unequally divided, each takes a greater interest, than if she had permitted the will to remain. It was ingeniously pressed for these children (and we must in these cases resort to small circumstances) that this is not a case of augmentation by the will, but by a codicil: but I cannot think, that in this case that makes any difference. The presumption I raise is from this; that in the very same instrument, where she did mean additional bounty, she has said so; and when I consider the particular circumstances of this case, they are fully sufficient to rebut the general presumption.

[*294] *I agree fully with Lord Thurlow, that it is much too late to contend, that *simpliciter* legacies given to the same person by two instruments, bearing different dates, (for that I must always guard it with; and I hope the Ecclesiastical Court will not go on to prove papers without date,) shall not be an accumulation. *Hooley v. Hatton* is so fully gone into in *Ridges v. Morrison*, that it is not necessary to state it. It has not escaped my attention, that in one of the codicils in that case, but not that, upon which the question arose, the testatrix used the words "over and above." *James v. Semmings*, 2 H. Black, 213, shows, how very slight circumstances will be sufficient to rebut the presumption the law makes. There the same question of double legacies arose in a Court of Law. By the will an annuity of 10*l.* was given to the wife Catherine Semmings, payable yearly. By the codicil, in which are the remarkable words "my farther will is," the same annuity is given out of the same estate to the same person, only payable quarterly instead of annually. I think, a great deal more argument arose upon that case than can arise upon this; for my judgment is, that there is internal evidence in this will and these codicils, that the testatrix had in contemplation the different situation of the family; that they could not take the whole benefit she intended; and she sets about making another disposition more beneficial and more definite than before. Therefore I am of opinion, she meant the second disposition to be a substitution for the other. The word "the" cannot weigh in this case; for the testatrix uses that word as to all the original legacies.

As to the claim of the family of Hobbs, I cannot get over the case of *Denn v. Bagshaw*, 6 Term. Rep. B. R. 512, and some before me. The words are "in case the said Catherine Hobbs shall happen to be living with me at the time of my decease; but not otherwise." *Non constat*, that some other person did not come to live with the testatrix in the same capacity; which I see by the codicil was the case; and probably that person had the very legacy intended for Catherine Hobbs in the event described. Therefore upon

that and the strong words "in case" I could not give this legacy: but as that part of the case is not reported, and does not arise before me, I shall take no notice of it.

For the leading rules as to what testamentary gifts shall be deemed accumulative, and in what cases a gift by a subsequent instrument is to be considered as a substitution for, and ademption of, a previous bequest, see, *ante*, notes 2 and 3 to *Moggridge v. Thackwell*, 1 V. 464.

BAYNHAM v. GUY'S HOSPITAL.

[* 295]

[ROLLS.—1796, DEC. 21.]

RIGHT of renewal forfeited by the laches of the tenant. (a)

The Court leans against a construction for perpetual renewal, unless clearly intended, [p. 295.]

A legal instrument is not to be construed by the acts of the parties, (b) [p. 295.]

By indenture, dated the 10th of May, 1725, the Marquis of Carnarvon in consideration of 319*l.* 10*s.* demised to Thomas Landon, his executors, administrators and assigns, certain premises situate in Stretton in the county of Hereford; to hold unto Landon, his executors, &c. for 99 years, if Thomas Landon the younger, Mary Landon the younger, son and daughter of the said Thomas Landon by Mary his wife, and Richard Eikley, or any or either of them, should so long live, under the yearly rent of 10*l.* That indenture contained the following covenant:

"And the said Lord Carnarvon for the considerations aforesaid and for the better encouragement of husbandry and improvement of the said lands and premises doth for himself his heirs and assigns covenant promise and agree to and with the said Thomas Landon his executors and administrators that he the said Lord Carnarvon his heirs and assigns shall and will from time to time and at all times hereafter at the request costs and charges in the law of the said

(a) But Equity will relieve, if the lessee has lost his right by the fraud of the lessor, or accident on his own part. 1 Maddock, Ch. 40, 41; *Lennon v. Napper*, 2 Sch. & Lefr. 689, Appendix.

(b) It seems questionable whether this principle can be maintained; though it is sustained by the emphatic language of Mansfield, C. J. in *Iggulden v. May*, 7 East, 237, who says, in allusion to *Cooke v. Booth*, Cowp. 819, "we think that was the first time that the acts of the parties to a deed were ever made use of in a Court of Law to assist the construction of that deed." But it has been declared in Massachusetts that, where a deed, conveying land, is of doubtful construction as to the boundaries, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. *Stone v. Clark*, 1 Metcalf, 378. And this principle seems to have the sanction of a writer of the highest authority in the Law of Evidence. Greenleaf, Evidence, § 293; *Cambridge v. Lexington*, 17 Pick. 222; Phil. & Am. on Ev. 747, note (1); 2 Starkie, Evidence, 928, note, (5th Amer. ed.); *Farrar v. Stackpole*, 6 Greenl. 154. But see *post*, p. 696, Hovenden, note to *Eaton v. Lyon*.

Thomas Landon his executors or administrators when and as often and within two years to be computed from the day next after the death of the first or any or either of the life or lives by which the said premises are shall or may be held and enjoyed shall happen to die renew and make a new lease or leases to him the said Thomas Landon his executors or administrators or any or either of them of the said messuages or tenements lands and premises herein before demised to commence from the expiration of these presents and at and under the yearly rents and covenants hereinbefore reserved for one life or 99 years, determinable upon such life the said Thomas Landon his executors or administrators paying or allowing for a fine income or consideration for every such life to be added the sum of 53*l.* 5*s.* of lawful money and so as often and in course one after the other as any of the life or lives in being or any future life or lives shall as before agreed to be renewed die or depart this life Provided such fine or fines be paid or tendered to be paid unto the said Lord Carnarvon his heirs or assigns within two years to be computed from the day next and immediately after the death or decease of any or either of the life or lives thentofore in being and so dying as aforesaid and as often as one life or lives whereby the said demised [* 296] premises *shall be held and enjoyed shall die or depart this life Provided always and further it is agreed upon by and between the said parties to these presents and it is the true intent and meaning hereof and of the parties hereunto that if upon or after the death of any of the life or lives hereinbefore named the said Thomas Landon his executors or administrators shall refuse or neglect to renew the said lease or make application therein or to act in and name one other life or lives in the place and stead of any life or lives dying over and above and more than the time and space of two years as aforesaid and thereby also neglect or refuse tender of such new lease and to pay unto or tender to or for the use of the said Lord Carnarvon his heirs or assigns the sum of 53*l.* 5*s.* of lawful money for a fine for such life or consideration for every life to be hereafter added at or in the church porch of the parish church of Stretton aforesaid and thereof give ten days notice in writing unto the said Lord Carnarvon his heirs or assigns or agents for the time being of such his or their intention and tender then this indenture of lease and every article clause and thing herein contained shall cease determine and be utterly void and of none effect."

After the execution of the lease Lord Carnarvon conveyed the demised premises in fee-simple to the president and governors of Guy's Hospital, subject to the lease; and soon afterwards died. Thomas Landon, the lessee, enjoyed the estate under the lease till his death about the year 1731; and by his will, dated the 11th of April, 1731, he gave it to his son and daughter, Thomas and Mary Landon, to be equally divided between them. Thomas Landon, the son, died many years ago unmarried. Mary Landon, his sister, married George Baynham, and died in 1775; leaving her husband and Anthony and Lucy Baynham, their children, surviving. Anthony

Baynham obtained letters of administration to his father, and died. Richard Eikley, the surviving life in the lease, died on the 3d of October, 1785. Lucy Baynham obtained letters of administration with the will annexed to Thomas Landon, the elder. She also obtained administration to Thomas Landon, the son, and to her mother Mary Baynham and administration *de bonis non* to her father George Baynham.

No application having been made for renewal of the lease previous to August, 1786, and no step having been taken in consequence of that neglect, Lucy Baynham caused a written notice according * to the provisions of the lease, dated the [* 297] 4th of August, 1786, to attend in the church porch for that purpose on the 21st to be fixed on the door of the church of Stretton. She also caused a copy of the notice to be served upon the agent for the Hospital; who upon the death of Eikley procured the tenants to attorn, and received the rents and profits of the premises.

Lucy Baynham attended according to the notice: but no person attending for the Hospital, and her applications for renewal being rejected, she filed the bill, praying, that the Defendants should be decreed to grant a new lease upon payment of such fine and upon such terms as to the Court should seem just and reasonable.

Mr. *Graham* and Mr. *Short*, for the Plaintiff. The decisions by the House of Lords upon the late cases from Ireland seem to incline against the renewal of these leases: *Vipon v. Rowley*, 1774; *Kam v. Hamilton*, 1776; *Bateman v. Murray*, 1779; but in this case the Plaintiff is entitled by express words to renewal, whenever any life or lives shall drop; and the delay arises from poverty. In *Lord Ross v. Worsop*, 4 Bro. P. C. 411, and *Rawstorne v. Bentley*, 4 Bro. C. C. 415, a renewal was decreed. Where one part of a covenant is in opposition to another, and they cannot be reconciled, upon the principle of the construction of deeds the former ought to stand, and the latter to be rejected.

Mr. *Lloyd* and Mr. *Stanley*, for the Defendants, were stopped by the Court.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. I shall lay the Irish cases out of the question. They went upon what Lord Lifford calls a local equity. They had gone on upon the idea, that a renewal might be claimed at any distance of time. Lord Thurlow upon the appeal to the House of Lords in *Bateman v. Murray* disavowed that; and said, he could not sitting here administer an equity, which did not arise upon the case; and the decree made in Ireland was reversed; upon which an act of Parliament was procured in Ireland to put an end to it. You will see a very elaborate judgment of Lord Lifford's in Vernon and Scriven's Reports (1).

I strongly protest against the argument used by the learned Judges in *Cooke v. Booth*, Cowp. 819, as to construing a legal instrument

(1) *Boyle v. Lysaght*, and *Magrath v. Lord Muskerry*, Vernon and Scriven's Reports, 135, 166.

by the equivocal acts of the parties and their understanding upon it; which I will never allow to affect my mind. That case was sent to law by Lord Bathurst. The learned Judges thought fit to return an answer to the Chancellor, that the legal effect was a perpetual renewal, upon the ground, that by voluntary acts, which the parties might or might not have done, the parties themselves had put a construction upon it (1). Mr. Justice Willes stated that as his only ground. Lord Mansfield made it his chief ground: but that ground was disapproved by Lord Thurlow; and is, I think, totally unfounded. I never will construe a covenant so. I never was more amazed; and Mr. Justice Wilson who argued it with me, was astonished at it. When it came back, Lord Bathurst not having retained the Great Seal long enough for it to come again before him, it came before Lord Thurlow; who said, that sitting as Chancellor when he asked the opinion of a Court of Law, whatever his own opinion might be, he was bound by that of the Court of Law; therefore he decreed a renewal; but said, he should be very glad, if Mr. Booth would carry it to a superior tribunal. We had a consultation; and I wrote to Mr. Booth upon it: but he being only tenant for life, refused to appeal. There stands the case of *Cooke v. Booth*. I see, I have put a note to that case, referring to *Tritton v. Foote*, 2 Bro. C. C. 636; which is a positive determination against the claim (2). I collect therefore from these cases this; that the Courts, in England at least, lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear, that the covenant does mean it. *Furnival v. Crew*, 3 Atk. 83, which is relied on in *Cooke v. Booth*, had clear words for a perpetual renewal; which made it impossible to construe it otherwise.

In this case how could it be upon the death of the first life at "the expiration of these presents?" Those are extraordinary words. The construction for the Plaintiff is, that the lessor will renew, whenever any life or lives shall drop; that it does not say, that if they come at the end of the third life, they may not have a renewal. I admit it upon that clause: but see the proviso, that follows; that if upon or after the death of any of the life or lives, the [* 299] said Thomas *Landon, his executors, &c. shall refuse or neglect to renew, &c. Whatever doubt there may be upon the first part, there can be none upon this clause; unless it is argued, that Lord Carnarvon not taking advantage of it proves, that he did not understand it so: but I lay out of the case the conduct of the party not availing himself of that clause. I cannot argue, as the Court of King's Bench did in *Cooke v. Booth*; and am clearly of opinion, the lessee has not entitled himself to the benefit of the covenant; and they might, if they pleased, have ejected him for not applying, when the first life dropped. Therefore the right

(1) *Post*, 694; vol. xvi. 156.

(2) See *Bridges v. Hitchcock*, 1 Bro. P. C. 522.

of renewal is forfeited; the Plaintiff has no claim here; and the bill must be dismissed (1).

1. A COVENANT for renewal of such a nature as would virtually lead to a grant in perpetuity, will never be enforced in Equity, where no sufficient consideration for such a grant appears, and where the parties have not expressed themselves in language devoid of all ambiguity. See, *ante*, note 4 to *Taylor v. Stibbert*, 2 V. 437.

2. The principal case was considered as one clear of all shadow of doubt in *Marxell v. Ward*, 1 M'Clel. 466.

3. The *dictum*, ascribed in the report of the present case to Lord Thurlow, that, "when he asked the opinion of a Court of Law, he felt bound by it, whatever his own opinion might be," has not been acquiesced in. Lord Eldon, and Chief Baron Richards, held it to be clear, that a Court of Equity, though it may think fit to direct a case to a Court of Law, is not bound by the certificate of the Court of Law. *Prebble v. Boghurst*, 1 Swanst. 323; *Marxell v. Ward*, 11 Price, 18.

HALES v. MARGERUM.

[ROLLS.—1796, DEC. 23.]

TESTATOR gave 1000*l.* stock to a married woman for her separate use, and whenever she should die, to be absolutely in her own power to dispose of by will or writing purporting to be her will to any person or persons, purpose or purposes, she should think proper: but, in case of failure of any such disposition or appointment, to go over: this is not a power, but an absolute gift, qualified only to exclude the husband upon the death of his wife: therefore it passed by general words in her will. (a)

SAMUEL RUTTER by his will gave to his executors 1000*l.* Consolidated Bank Annuities upon trust "for the sole use and benefit of my daughter Elizabeth Tichborne, the same not to be subject to the debts, incumbrances or control or engagements, of her husband Robert Tichborne, or any other husband she may hereafter be married to; and all interests and dividends, which shall become due and payable for the same after my decease, shall be paid to her for her own separate use and benefit only; and her own receipt notwithstanding her coverture shall be to them or either of them a sufficient discharge during her life; and whenever she shall happen to die, the said 1000*l.* Annuity Stock shall be absolutely in her own power to dispose of by her last will and testament or any deed or writing purporting her last will and testament to any person or persons or to

(1) *Bayly v. The Corporation of Leominster*, 3 Bro. C. C. 529, *ante*, vol. i. 476, and the references in the note.

(a) As to the execution of a power, see *ante*, note (b) to *Standen v. Standen*, 2 V. 589. In the present case the absolute property being given, the power becomes nugatory, and is construed to be nothing more than an anxious expression by the donor, that she may have an uncontrolled power of disposing of the property. 2 Story, Eq. Jur. 1394, and cases cited. *Smith v. Bell*, 6 Peters, 68; Mr. Chancellor Kent has critically reviewed the authorities in his learned opinion in the case of *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 86-114.

any purpose or purposes, she shall think proper; her being under coverture at the time of her death or any other restriction or pretence to the contrary in any manner notwithstanding: but in case of failure of any such disposition or appointment then and in such case the said 1000*l.* stock shall devolve to and become the right and property of my grand-daughter Elizabeth Tichborne, to be paid or assigned and transferred to her so soon after the decease of her mother as the same can conveniently be done."

Elizabeth Tichborne, the grand-daughter of the testator, married William Everest; and she died in the life of her mother, [*300] the daughter * of the testator; who by her will after giving some legacies proceeded thus: "All my freehold messuages, lands, woods, and hereditaments, and also all my stocks, funds, monies and securities, and all other my real and personal estate and effects whatsoever I give, devise and bequeath, the same respectively unto and to the use of Samuel Margerum," his heirs, executors, administrators and assigns, respectively upon trust for the benefit of such of her three grandchildren, Elizabeth, Frances, and Robert Everest, as shall live to attain the age of twenty-one, as tenants in common, and to their, her, or his heirs, executors, administrators and assigns, respectively; the issue of any dying under twenty-one to take the share of the deceased parents; with survivorship upon the death of any, and a limitation over upon the death of all, her said grand-children, under age without leaving issue.

Elizabeth Everest married Charles Hales.

The object of the bill was to have the benefit of the disposition made by the will of Elizabeth Tichborne; and the question made at the bar was, whether she had by her will executed the power of appointment over the 1000*l.* stock bequeathed by the will of Samuel Rutter.

The cases cited were *Sir Edward Clere's Case*, 6 Co. 17. b. *Ex parte Caswell*, 1 Atk. 559. *Andrews v. Emmot*, 2 Bro. C. C. 297. *Buckland v. Barton*, 2 Hen. Black. 136, and *Standen v. Standen*, (*ante*, Vol. II. 589.)

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN]. I suspended my opinion in this cause with some expectation of the final determination of *Standen v. Standen*; which is gone to the House of Lords (1).

I have no difficulty upon this case; for it is stronger than even *Standen v. Standen*; and I am clearly of opinion, that under the words of the will this sum of 1000*l.* Bank Annuities was to all intents and purposes the absolute property of this married woman, as fully as any married woman can enjoy an absolute gift, and merely qualified in respect of her situation as a married woman, lest upon her death it should go to her husband. Upon that ground it is out of all the cases; *Andrews v. Emmot*, *Buckland v. Barton*, and *Stan-*

(1) The decree in *Standen v. Standen* has been since affirmed, 6 Bro. P. C. 193. See the note, *ante*, vol. ii. 594.

den v. Standen. The question is, whether she had a mere power and whether the general words, she has used in her will, are an execution of that power, and are sufficient to show, the testatrix intended to comprehend the subject. *Andrews v. Emmot* is a leading case upon this point; and has perfectly and clearly established, that to execute a power there must be a direct reference to it, or a clear reference to the subject, or something upon the face of the will, or independent of it some circumstance, which shows, the testator could not have made that disposition without having intended to comprehend the subject of his power. In *Standen v. Standen* that case is fully commented upon by the Lord Chancellor. The will contained only general words; and the question was, whether they would comprehend a sum of money, originally the wife's, which the husband, in case he should die without children, had power to dispose of, but not if he should have children. When the testator made his will, his wife was alive, and the circumstances might or might not change. At his death his circumstances were so much reduced, that without the sum, over which he had that contingent power, there was not sufficient to pay the legacies. Lord Kenyon very properly refused to go into that evidence. The Lord Chancellor says, *non constat*, what was his situation, when he made the will. Therefore in that case both Lord Kenyon and the Lord Chancellor were of opinion, that his estate could not be held fairly to comprehend the sum, over which he had that power of disposition.

Upon full consideration of this case, and fully agreeing with what is laid down in *Andrews v. Emmot* and *Buckland v. Barton*, I am of opinion, his is not a mere power to dispose, but an absolute gift, qualified only as to her situation as a married woman, and to prevent the husband from taking as administrator in case of her death. If the interests of married women are criticised, as this has been, I do not know, how property could be given to a married woman: it would be all power. When this testatrix gives all her stock and all her real estate, she does mean to include this sum. It must be included under the word "my;" being an absolute interest in her. I do not now want the authority of *Standen v. Standen*; though I do not quarrel with it.

WITH respect to the execution of powers, see, *ante*, notes 1 and 3 to *Bull v. Vardy*, 1 V. 270, note 4 to *Standen v. Standen*, 2 V. 589, and note 5 to *Blake v. Bunbury*, 1 V. 194.

SCOTT v. CHAMBERLAYNE.

[ROLLS.—1796, DEC. 19, 21; 1797, JAN. 24.]

DEVISE in fee and bequest of personal estate to A.; and, in case of his death under twenty-one without leaving issue, to B. Codicil affirming the will in all respects except by directing, that A. shall not be entitled till twenty-five: A. dying between the ages of twenty-one and twenty-five without issue, B. has no title. (a)

EDWARD CROCKLEY devised certain real estates in the county of Norfolk to his grand-son Edward Sackville Turner and his heirs and assigns for ever; but in case his said grand-son shall depart this life before he attains his age of twenty-one years and without issue of his body lawfully begotten, then he gave and devised the said messuages, lands, &c. to his grand-daughter, to hold for her natural life; and after her decease to the heirs of her body, as tenants in common and not as joint-tenants: but in case both his said grand-children shall depart this life, before they attain twenty-one as aforesaid, and without leaving issue of their bodies lawfully begotten, then it was directed that the said premises should be sold, and the produce should be given to certain persons. The testator then directed his executors to collect all his personal estate, and turn it into money, and dispose of the produce in paying his debts and legacies, and to pay the surplus into the hands of Lord Cornwallis in trust to receive such moneys and to place the same out at interest upon public or private security as he thinks fit, until his said grand-son shall attain the age of twenty-one; and that the interest arising therefrom, together with the rents and profits of the estates, which his grand-son shall be entitled to by the will or otherwise, shall be applied in the maintenance and education of his said grand-son, till he shall attain the age of twenty-one; and when and as soon as he shall attain the age of twenty-one, then upon trust to call in all such sums of money and pay the same, together with the interest due to his said grand-son; which the testator thereby gave and bequeathed to him as and for his sole right and property: but in case he shall depart this life before he attains twenty-one without leaving issue of his body, then the testator gave the whole principal and the interest, that should be due, to his said grand-daughter, if and when she shall attain twenty-one, as and for her sole right and property: but in case she shall depart this life before twenty-one without leaving issue lawfully begotten of her body, then he gave it over.

By a codicil the testator confirmed every part of his will and all and every the limitations, uses, trusts, gifts, conditions, legacies, be-

(a) Where the testator, in the disposition of his property, overlooks a particular event, which, had it occurred to him, he would in all probability have provided against, the Court will not rectify the omission by implying or inserting the necessary clause, conceiving it would be too much like making a will for the testator, rather than construing that already made. 2 Roper, Legacies, by White, 322, 326, ch. 21, § 9, where the authorities in support of this principle are collected and arranged.

quests, directions and appointments, as to his real and personal estate, save and except such devises, uses, directions and bequests, as are hereinafter by him revoked, altered or made void ; and reciting, * that by his will he had given to his grandson [* 303] Edward Sackville Turner all those messuages, lands, tenements, &c. he declares his will and mind to be, and he orders and directs, that his said grandson Edward Sackville Turner shall not by virtue of his said will be entitled to or come into possession of the said hereditaments or premises, till he shall have attained his age of twenty-five years ; and that his executors shall receive the profits of his said estates till that time, in case his grandson shall so long live, and after paying an annuity to the testator's wife pay the residue to his said grandson in equal half-yearly payments, till he attains the age of twenty-five years ; and reciting the disposition of the personal estate by the will the testator orders and directs, that such interest and principal shall not be paid to his said grandson and become his sole right and property, until he attains the age of twenty-five years.

Edward Sackville Turner attained the age of twenty-one, but died under twenty-five without leaving issue. The bill was filed by the grand-daughter and her husband, claiming under the limitation over.

Daintry v. Daintry, 6 Term Rep. B. R. 307, was cited.

Dec. 21st. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The Plaintiff argues against the words of the will ; which give it to her, in case the grandson shall die, before he attains the age of twenty-one without issue. The codicil confirms every part of the will, except that as to the grandson it alters the age of twenty-one to twenty-five. It leaves all the other words to operate. Therefore unless they will have a case made, I shall dismiss the bill. It is a mere question of law upon a very obscure will and codicil ; therefore I canvass every word to see, what vested interests there are, and what executory devises and upon what contingencies. Upon the first part of the will as to the real estate, there is no doubt, Edward Sackville Turner took a vested interest transmissible, subject only to the contingency of going over upon his death before twenty-one without leaving issue. As to the personal estate perhaps there may be some doubt, whether he had any vested interest in that, till he should attain the age of twenty-one. It is not so clearly vested in the mean time ; and "when" may possibly be construed as a word of condition. But it is given over only upon the contingency of his dying before twenty-one without leaving issue. It is true, the testator has by the codicil suspended the possession, and perhaps taken away the vested interest : but the Plaintiff can only claim in that event of his dying *under twenty-one with- [* 304] out leaving issue. He forgot to say, that if the grandson dies before the age of twenty-five without leaving issue, then it shall go over. Therefore I am of opinion, the Plaintiff has no interest. But it is a very doubtful point. I think, the doubt is, whether the

testator died intestate as to that. This codicil cannot be construed to contain all those words. I cannot carry the will into execution upon the bill of this Plaintiff. At present I am inclined to dismiss the bill. Let it stand till the next Term to consider, whether they will have a case made. If I hear no more of it, the bill must be dismissed.

The Plaintiff declined going to law.

MASTER OF THE ROLLS. I am of the same opinion as I was before. The question is, whether the codicil has given the Plaintiff any interest in the event, that has happened. I am ready to declare, that nothing is given to her but upon the contingency of Edward Sackville Turner's dying under twenty-one without leaving issue; therefore I am not called upon to declare more than that. The will gives it to her upon a contingency, which has not happened. The codicil postpones either the vesting or the possession, (I do not care which,) as to the grandson till the age of twenty-five. I do no more than dismiss this bill; leaving the executors of Edward Sackville Turner, the parties, who claim under his will, or the next of kin of the original testator, to make such questions, as they may think fit. I only determine, that this Plaintiff takes no interest whatsoever (1).

THE context of a will may show, that the word "when" is to be applied to the possession only, not to the vesting of legacy. *Branstrom v. Wilkinson*, 7 Ves. 422; *Lane v. Goudge*, 9 Ves. 230; *Lambert v. Parker*, Coop. 145. But, to justify this construction, there must be circumstances, or other expressions in the will showing such to have been the testator's intent; for the word "when," standing by itself, unqualified and unexplained, is a word of condition, denoting the time at which the gift is to commence. *Hanson v. Graham*, 6 Ves. 243; *Leake v. Robinson*, 2 Meriv. 286. The absolute gift of the intermediate interest would denote a clear intention that the legacy should vest. *Hanson v. Graham*, 6 Ves. 250. The word "then," in a limitation of estates, usually is not an adverb of time, but of relation to some conditional antecedent. *Dormer v. Beaucherk*, 2 Atk. 310; *Reeves v. Brymer*, 4 Ves. 698; *Pinbury v. Elkins*, 1 P. Wms. 564; *Bigge v. Bensley*, 1 Brown, 190.

HALE, *Ex parte*.

[1797, FEB. 4.]

ACCEPTOR becoming bankrupt, the petitioner having indorsed before the bankruptcy took up the bill: he may prove; but cannot set off a debt due from him to the estate.

THE acceptor of a bill of exchange for 200*l.*, indorsed by the petitioner, becoming a bankrupt, the petitioner was obliged to take it up; and being indebted to the bankrupt's estate to the amount of 90*l.* he prayed, that he might be at liberty to set off.

(1) This decree was affirmed, *post*, 491.

Mr. Cox, for the petition, cited *Ex parte Brymer*, 1 Cooke's B. L. 205, and *Ex parte Sheddon*, in the last Term.

Mr. Leach, *contra*. In the latter case by permitting the indorser to prove, no new burthen was thrown upon the estate. I admit *this bill must be proved; because it was an exist- [* 305] ing debt; but the utmost to be taken was a dividend upon it. Admitting the set-off would be paying a part in *specie*, to which the estate was not liable at the bankruptcy; and therefore would throw a charge upon the estate, to which at the bankruptcy it was not liable. There was no mutual credit. It is a clear principle, that the acts of third persons after the bankruptcy shall never be allowed to throw a charge upon the estate.

LORD CHANCELLOR [LOUGHBOROUGH]. The petitioner desires to carry *Ex parte Brymer* much farther than the principle goes. Pay the 90*l.* that you owe the estate, and prove the 200*l.* I see no objection to that; but you cannot by paying that bill put yourself in a better condition than any other creditor. There was no mutual credit. There was a debt created upon the estate, and due at the time of the bankruptcy: but that debt was not due to you: therefore in that respect the set-off fails. In the latter case cited there was no prejudice to the estate: it made no larger demand.

Dismiss the petition so far as it seeks to set off the 90*l.* They do not object to your proving the 200*l.* (1).

HAD the bill of exchange, which was the subject of the present petition, been in the petitioner's own hands, at the time of the acceptor's bankruptcy, that would have raised a case of mutual credit, (*Hankey v. Smith*, 3 T. R. 507,) and consequently of set-off. *Dickson v. Evans*, 6 T. R. 57.

BARNES v. ROWLEY.

[1797, FEB. 7.]

LEGACY of stock to A. to be laid out in annuity for her life: A. died two days after the testator and before any alteration of the stock: her administrator is entitled to a transfer. (a)

THIS cause arose upon the following disposition by will: "I will and bequeath to Mary Steele 252*l.* which I have in the 5 per cents.

(1) *Tempest v. Ord*, 1 Mad. 89.

(a) It is established by several cases, that, where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even before the fund is available, as during the life of the person after whose death the investment is to be made, yet still it is a vested legacy, from the death of the testator; and the legatee for whose benefit it was intended, having survived the testator, may elect either to take the sum, or have it laid out in an annuity. 2 Williams, Executors, 866, and cases cited; *Palmer v. Craufurd*, 3 Swanst. 305; *Dawson v. Hearn*, 1 Russ. & M. 606; *Bayley v. Bishop*, 9 Ves. 6.

to be laid out in annuity for her life ; and the 100*l.* that I have in the 3 per cents. I leave to be laid out in the necessary expenses of my funeral and mourning rings for my particular friends.”

The will was dated the day before the death of the testator. A few hours before his death Mary Steele made an attempt upon her life : and two days afterwards effected her purpose of suicide. The bill was filed by her administrator against Doctor Rowley, the executor, to obtain a transfer of the 252*l.* stock ; which remained in the name of the testator unaltered. The claim was resisted upon the ground, that the testator died intestate as to this fund ; Mary Steele having no vested interest in the capital, but being entitled to the income.

[* 306] *Mr. *Lloyd*, for the Plaintiff. The question is exactly the same, as if a bill had been filed by Mary Steele ; and if she had filed a bill, she clearly would have been entitled to the capital, and not to the interest only. She might have elected to take it, and not to have it laid out. No benefit in this was intended for any one but her.

Mr. *Graham*, for the Defendant. This is a very particular case. The testator certainly meant, that Mary Steele should take this in the shape of an annuity or not at all. It was intended peculiarly personal to her. She could not have had that election ; but it must have been laid out in an annuity for her.

Lord CHANCELLOR [LOUGHBOROUGH]. Could I have prevented her selling the annuity the next day, if it had been laid out in an annuity for her ? The whole 252*l.* would have been gone. The interference of the Court against the will of the legatee to compel the laying out the money in an annuity for a person, her own mistress, would have been perfectly nugatory and vain. The executor can never benefit by it. I cannot raise a doubt upon it. The legacy vested by her surviving the testator, however short a time. Decree the stock to be transferred to the Plaintiff (1).

A sum bequeathed for the purchase of an annuity, is a vested interest in the annuitant ; who may elect to take the money, without having it laid out in the purchase of an annuity. *Bayley v. Bishop*, 9 Ves. 9 ; *Yates v. Compton*, 2 P. Wms. 309 ; *Dawson v. Killet*, 1 Brown, 123 ; *Palmer v. Crauford*, 2 Wils. Cha. Ca. 84 ; *Balmain v. Shore*, 9 Ves. 507.

(1) *Post*, *Bayley v. Bishop*, vol. ix. 6 ; *Palmer v. Crauford*, 3 Swanst. 482.

SELWOOD v. MILDMAI.

[ROLLS.—1796, JUNE 27; 1797, FEB. 15.]

TESTATOR gave a sum, part of his 4 per cent. Bank annuities, to his wife for life, and after her decease to several relations. Evidence was admitted, that he had no such stock at the date of the will, having previously sold it all, and invested the produce in Long Annuities, and to show the cause of the mistake; and the legacies were established. (a)

Testator bequeathed part of his 3 per cent. Consolidated Bank Annuities. Upon evidence, that he had no Bank Stock at the date of his will or his death, but that he had 3 per cent. South Sea Annuities, the legacy was established out of that fund, [p. 308, note.]

Bequest of stock: if the testator has it at the time, it is specific; and any act destroying it proves an intention to revoke. If a ring or a picture bequeathed cannot be found, that cannot be rectified, (b) [p. 310.]

WILLIAM MILDMAI by his will, dated the 26th of January, 1796, gave to his wife Elizabeth Mildmay the interest and proceeds of

(a) With respect to the admission of parol evidence to explain ambiguities in wills, see *ante*, note (b) to *Baugh v. Read*, 1 V. 257. Where the object of a testator's bounty, or the subject of disposition, (i. e. the person or thing intended,) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator. Wigram, *Interpretation of Wills*, 101, Proposition vii. The present case constitutes an exception to this proposition; and it has been observed that, although the evidence consisted of facts only, unconnected with the question of intention, it cannot be explained upon the principle of inaccurate description. The evidence did not establish any correspondence or agreement whatever between the description in the will and that of the subject intended. The testator had not, even imperfectly, described the thing he meant to have described; on the contrary, the evidence clearly proved, that he had by mistake described one thing where he meant another. The case would in substance have been the same, if the proceeds of the sale of the testator's 4 per cent. stock had been traced into an investment in land, instead of Long Annuities, in which case it seems, his intention would have been disappointed. *Ibid.* 103, 104, pl. 132. The same ingenious writer says of the present case, and also of *Doc v. Huthwaite* 3 B. & Ald. 632; *Dorr v. Geary*, 1 Ves. Sen. 255; *Dobson v. Waltherman*, in the note to the present case; *Pentecost v. Lee*, 2 Jac. & Walk. 207; *Evans v. Tripp*, 6 Mad. 91, that it is at least doubtful whether they can be explained upon any strict principles of exposition. *Ibid.* 106, pl. 134. They appear to be decisions in which a general principle has been sacrificed to meet the hardships of particular cases. *Ibid.* 130, pl. 168. The present case was doubted lately by Tindal C. J. in *Miller v. Travers*, 8 Bing. 244, who seems to have thought it proceeded on a correct principle; but that principle, it had been said, was wholly misapplied, and the case is one which ought not to be followed in *specie*. The case is no farther authority from the facts contained in it than to the following extent: that when a legacy is *specific*, collateral evidence of the state of the testator's property at the date of the will, may be received concerning the subject to which the bequest applies, for the purpose of ascertaining whether the description agrees with it or not, and that, if there be no such fund belonging to him as that described, and he had property in other funds not answering the exact description, but of the same nature with it, such property will pass to the legatee, upon the presumption that it was meant to be given, though under a mistaken description. 1 Roper, *Legacies*, by White, 222, ch. 4, § 4; Wigram, 167, 168, pl. 193. See also, 1 Greenleaf Ev. § 289, 291; *Hiscocks v. Hiscocks*, 5 M. & W. 353, 367; *Doe v. Martin*, 1 N. & M. 524; S. C. 4 B. & Ad. 771; 2 Williams, *Executors*, 867; *Boys v. Williams*, 2 Russ. & M. 689, where parol evidence of the testator's property and situation was held admissible, to determine whether a bequest of stock was intended as a specific or a pecuniary legacy.

(b) See *ante*, note (a) to *Coleman v. Coleman*, 2 V. 639.



1250*l.* "part of my stock in the 4 per cent. Annuities of the Bank of England for and during the term of her natural life, together with such dividends as shall be due upon the said 1250*l.* at the time of my decease;" and after the decease of his wife he gave the said stock to several of his relations in certain shares and proportions; always calling it his 4 per cent. stock; and he disposed of the residue.

[*307] *The testator died the 2d of February, 1796.

The bill was filed by some of the legatees; and it was referred to the Master to inquire, what the personal estate, not specifically bequeathed, consisted of at the time of making the will and at the death of the testator; and whether he had before or at the time of making the will or at his death any 4 per cent. Bank Annuities standing in his name or in trust for him; and whether he had disposed of the same; and if so, what became thereof; and whether the produce was again invested, and in what funds.

The cause coming on for farther directions, the Master's report stated, that he found by the affidavit of one of the executors, that the personal estate consisted at the death of testator of 137*l.* per annum in the Long Annuities; and that he had no other personal estate except his household furniture and certain leasehold premises specifically bequeathed; and he found by the affidavit of Thomas Francis of the Bank, that in the beginning of February, 1792, the testator sold out 3200*l.* 4 per cent. Bank Annuities; and upon the 9th of the same month he sold the farther sum of 175*l.* 4 per cents.; which by the Bank books appear to have been all the stock he had in the said fund; and with the produce upon the 4th of February, 1792, he purchased 100*l.* per annum Long Annuities; and upon the 7th of the same month he purchased 10*l.* per annum in the same fund; and upon the 9th of the same month he purchased 20*l.* more in the said Long Annuities; and in 1795, he purchased 7*l.* more in the said Long Annuities; and from the respective purchases aforesaid and at his death he had the said 137*l.* per annum Long Annuities standing in his name; and he had not from the time he so sold out his said stock, nor at the time of making his will, nor from thence till the time of his death, any stock in the 4 per cent. Bank Annuities; and by the advice of the deponent he sold out his said property in the 4 per cents., and invested the same in the Long Annuities; and the Master found by the affidavit of — May, that the deponent was the attorney of the testator: who received instructions from him to prepare his will; and the testator gave him as part of such instructions a former will, by which he had given divers legacies payable out of his stock in the 4 per cent. Bank Annuities; and the testator not having informed the deponent, that after making the said will he had sold out his said stock and vested the produce

in Long Annuities, the deponent prepared the will, as if
[*308] the said stock *had not been so changed, and described the property as still 4 per cents.; and he believes, the mistake in the will arose from that cause and no other; and imme-

diately afterwards by the direction of the testator he burnt the former will.

Mr. Piggott, Mr. Graham, Mr. Sutton, and Mr. Short, for the legatees of the 4 per cent. stock.

This is substantially a disposition by the testator of his property; and the description is a mere mistake, and as a latent ambiguity may be explained by evidence. This is the only provision the testator has made for his wife. The Long Annuities are sufficient to satisfy these bequests. The authorities are with the reason of the thing. *Hodgson v. Hodgson*, 2 Vern. 593. *Day v. Trigg*, 1 P. Will. 286. In this case as in that the testator had no such thing, as he describes; which is the principle stated in *Ashton v. Ashton*, 3 P. Will. 386, with reference to the case in 2 Leon. of tithes passing under a devise of land; because the deviser had no land: but this is a more favorable case; for this property is of the *genus* of that described in the will; though it does not exist in the form, in which it is disposed of. *Partridge v. Partridge*, For. 226. *Purse v. Snaplin*, 1 Atk. 414. *Avelyn v. Ward*, 1 Ves. 424. *Fonnereau v. Poyntz*, 1 Bro. C. C. 472. *Dobson v. Waterman*, at the Rolls, 7th Feb. 1787 (1).

(1) Thomas Dobson by his will, dated the 29th of September, 1784, bequeathed "the sum of 700*l.* capital stock in the 3 per cent. Consolidated Bank Annuities, part of the stock of that denomination now standing in my name in the books of the Governor and Company of the Bank of England, unto my nephew John Dobson, his executors and administrators, for his own use and benefit." He gave all the residue of his stocks in the public funds and of his personal estate to Thomas Dobson, one of the Defendants; and appointed the Defendants Waterman and Qvested his executors.

The testator was not, when he made his will, or at his death, possessed of any stock whatever at the Bank: but he was possessed of 1800*l.* 3 per cent. South Sea Annuities of the year 1751. He was blind, when he made his will: and had been so for many years. The bill was filed to have this legacy of 700*l.* stock and another legacy of 700*l.* given to the other Plaintiffs by the same description satisfied by a transfer of so much of the South Sea Annuities. The Defendants the executors in their answer stated the fact of what stock the testator died possessed. The Defendant the residuary legatee, who was an infant, insisted, that the legacies were specific legacies, and were void; as the testator had not any such property; and that they ought not to be made good out of the South Sea Annuities.

Upon the hearing, 20th June, 1786, Lord Kenyon, then Master of the Rolls, referred it to the Master to inquire and state, what 3 per cent. Bank or other Government securities the testator was possessed of at the time of making his will; and reserved farther directions and costs. Upon the 21st of December, 1786, the Master reported, that the books of the Bank containing the accounts of the 3 per cent. Consolidated Bank Annuities, 3 per cent. Reduced Annuities, and 3 per cent. Annuities of the year 1726, which were all the 3 per cent. Annuities payable at the Bank, had been searched from the date of the testator's will to his death; and that it did not appear, that he was possessed of any stock there; and that it appeared by the answer of the executors, that the testator died possessed of 1800*l.* 3 per cent. South Sea Annuities of the year 1751. The cause came on for farther directions: and the Master of the Rolls decreed the executors to transfer 700*l.* South Sea Annuities to the Plaintiff Dobson for his legacy, and the like sum for the other legacy; and gave all the parties their costs out of the personal estate generally. He said, the state of the testator's property made it manifest, that he was under a mistake as to the particular stock belonging to him: but, whatever stock it was, he certainly intended to give the sums of 700*l.* and 700*l.*, part of it, to the Plaintiffs.

This case was followed in *Pentecost v. Ley*, 2 Jac. & Walk. 207. See, also,

Baugh v. Read, (*ante*, Vol. I. 257) where the rule as to a latent ambiguity is laid down by Lord Thurlow in strong language. *French v. Inglis*, * 3 Bro. C. C. 420. *Simmons v. Vallance*, 4 Bro. C. C. 354. Godolph. Orph. Leg. 467.

Mr. Cooke, for infant Defendants. In *Fonnereau v. Poyntz* the inquiry went merely to the state of the property. May's evidence goes to explain the intention from acts of the testator; and therefore cannot be admitted. The cases all turn upon this; that the testator must have meant to give that property, which he had. In the case of the freehold and leasehold houses it was only a mistake of the tenure. So in the case at the Rolls the testator meant the 3 per cent. stock, that he had. This is completely a specific legacy. If a testator gives his black horse, having only a white one, that might be rectified: but if he gives a diamond ring, set so and so, that is a very different case; and if that *corpus* cannot be found, the legatee can take nothing.

MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN.] I do not think, this case has been quite determined by any of the cases, that have gone before it. I see in the case before Lord Kenyon he considered, that the testator by Bank Stock meant South Sea Stock; and that it was clear, he meant to give that. But the principles of the cases determined, which are very necessary to be adopted by a Judge, who wishes to effectuate the intention, are so clear, that I have no difficulty in saying, that a latent ambiguity arises from the testator's circumstances not being sufficient to meet the legacy, he had given. This is a provision for his wife; which makes it a strong case. The Court would struggle in opposition to a construction against the wife upon a mere mistake. There is no ambiguity upon the face of the will. Then the question is, whether the Court is not bound by every rule to admit evidence, where there is no ambiguity upon the will. Lord Thurlow's only doubt in *Fonnereau v. Poyntz* was, * whether parol evidence was admissible to ascertain, whether the testatrix did not mean capital; but he had no doubt, that he must know all the circumstances of her affairs; and therefore his first opinion was, that though it did appear, she could not mean to give so much more than she could afford, yet he doubted, whether he could give the words a meaning so different from their natural meaning.

In this case the evidence is to prove, not that it is a mistake, for that is clear, but to show, how that mistake arose; and when one reads what the case was, it would be unjust to refuse to rectify a mistake, so clearly and naturally accounted for. The testator had instructed a broker to sell out his 4 per cent. stock; and the identical money produced by that sale was invested in this Long annuity. Nothing is now doubtful. It is clear, the testator meant to give a legacy, but mistook the fund. He acted upon the idea, that he had such stock. The distinction is this: if he had had the stock at the

Gallini v. Noble, 3 Mer. 691. Where there is not the stock described, nor any other, that can be supposed intended, the legacy fails: *Evans v. Tripp*, 6 Madd. 91.

time, it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi*: but if it is a denomination, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject, out of which it is to arise, that will be rectified. Mr. Cooke puts the case of a testator giving his black horse, when he had only a white one: perhaps it would be said, he only mistook the color: but suppose he had more white horses: I would rather put the case of a ring or a picture. The Court could not rectify that, if the subject could not be found: but here the Court will rectify it. The case of the freehold houses is very analogous.

Declare, the Plaintiffs with the several legatees of the 1250*l.* stock are entitled to their legacies out of the testator's personal estate; and it being alleged, that the personal estate is not sufficient, let the Master declare, in what proportions they are to abate (1).

WITH respect to the admission of evidence to explain ambiguities in testamentary instruments, see, *ante*, the notes to *Baugh v. Read*, 1 V. 257, and to *Parsons v. Parsons*, 1 V. 266.

PORTER v. TOURNAY.

[* 311]

[ROLLS.—1797, FEB. 17, 20.]

UNDER a bequest of the use of a house with all the furniture and stock of carriages and horses and other live and dead stock for life, plate passed; wine and books did not. (a)

As to the effect of a limited use of articles, which are consumed by the use, *Quære*, (b) [p. 314.]

THE testator being possessed of considerable property gave several pecuniary legacies to the amount of 14,000*l.*, and among them 1000*l.* to Jane Worthington, and proceeded thus: "The aforesaid

(1) For the distinctions between specific and general legacies, and the various authorities, see Mr. Cox's note upon *Hinton v. Pinke*, 1 P. Will. 540, and Mr. Sanders's note upon *Purse v. Snaplin*, 1 Atk. 414; *ante*, *Coleman v. Coleman*, vol. ii. 639, and the note 641, and as to the admission of evidence to explain a latent ambiguity, *Parsons v. Parsons*, vol. i. 266, and the note, 267.

(a) As to the construction of the word "furniture" under a bequest, see 2 Williams, Exec. 859—865, and cases cited; *Cremorne v. Antrobus*, 5 Russ. 312; *Birch v. Dawson*, 2 Adolph. & Ellis, 37; *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; S. C. 3 Russ. 301; *Bunn v. Windrop*, 1 Johns. Ch. 338; *Carnagy v. Martin*, 2 Munf. 234. Of the words "stock on farm," see 2 Williams, Exec. 861; *Steward v. Cotton*, 5 Russ. 17; *Kendall v. Kendall*, 5 Munf. 273. It will be observed, that the Master of the Rolls says, (*post*, p. 314), that the present case "must never be quoted as a governing case, because it does not determine what 'live and dead stock' may mean, not coupled with other words."

(b) It should seem that a gift for life of things, *quæ ipso usu consumuntur*, as corn or wine, if specific, is a gift of the property; but if residuary, the things must be sold, and the interest of the produce paid to the legatee for life. 2 Williams, Exec. 1000; *Randall v. Russell*, 3 Meriv. 194; 2 Kent, Comm. 354, (5th ed.) So,

Jane Worthington to have the use of the house I now live in with all the furniture and stock of carriages and horses and other live and dead stock during her life and 200*l.* per annum out of the residue of my fortune." He gave the residue to his adopted son, and appointed Jane Worthington and two other persons executors.

Jane Worthington was an old friend of the testator, and had lived long in his family.

The bill was filed by the residuary legatee; and the question was whether Jane Worthington was entitled to any and what interest in the testator's books, and his stock of wines; the value of which was 150*l.* The Plaintiff gave up the question as to the plate upon the authority of *Kelly v. Powlet* mentioned by the Master of the Rolls.

Mr. *Graham* and Mr. *Hall*, for the Plaintiff. It is inconsistent to give an interest for life in articles, of which the use is the consumption. Ambiguous words are not to be extended. *Bridgman v. Dove*, 3 Atk. 201. *Kelly v. Powlet*, Amb. 605. *Slanning v. Style*, 3 P. Will. 334. The words "dead stock" must be taken to mean *ejusdem generis*. In *Trafford v. Berridge*, 1 Eq. Ca. Ab. 201, the phrase was "other things;" which is very large. *Timewell v. Perkins*, *Roberts v. Kuffin*, 2 Atk. 103, 113. *Boon v. Cornforth*, 2 Ves. 277. *Cavendish v. Cavendish*, 1 Bro. C. C. 467 (1). *Lady Gower v. Lord Gower*, Amb. 612, depends upon very particular circumstances. The intention of that will was, that every thing should be held just as the testator himself held. It is impossible [* 312] ble in this case, that the testator could intend to *place this legatee in the same situation, as he was in. If he meant her to reside in this house, he must have given her a much larger income. *Brooksbank v. Wentworth*, 3 Atk. 64, also went upon very particular circumstances; and Lord Hardwicke said, if the testator had stopped at the word "stock," that would not have had the large construction.

Mr. *Piggott* and Mr. *Sutton* for the Defendant Jane Worthington. "Furniture" *per se* would not pass liquors nor a library: but the intention was to give this legatee the use and enjoyment of every thing, that was in the house: that is, every thing falling naturally within the description: not if he kept money or other valuable property there. "Live and dead stock" must be referred not only to carriages and horses, but to all the preceding words. They would comprehend all stock; poultry, pigs, hay, corn, &c.; therefore the principle relied on fails; for many of these articles must be consumed. It is plain, he intended, she should live in the house.

Reply. Considering the large income of the testator and the ex-

in the Law of Bailments, where there is a loan for consumption (the *mutuum* of the Roman law) of corn, or wine, the absolute property passes to the borrower, and he is bound to restore, not the same thing, but other things of the same kind. Story, Bailments, § 228, 283.

(1) *Crichon v. Symes*, 3 Atk. 61; *Le Farrant v. Spencer*, 1 Ves. 97; *Moore v. Moore*, 1 Bro. C. C. 127; *Hunt v. Hort*, 3 Bro. C. C. 312.

tent of his legacies, it is impossible he could intend this legatee to live, as he did. Books and wines cannot be comprehended under the phrase "dead stock;" which phrase is evidently used in opposition to live stock, applicable to out-of-door stock. As to pigs, pigeons, poultry, fish, &c., though the individual thing is destroyed, the species continues to exist: the race is continually propagating. Tenant for life is bound to keep up the stock. The argument, that *usu consumuntur*, does not apply to them. It cannot be supposed, he intended to give his books to this old lady, and to exclude his adopted son, whom he was educating in such a manner, that they would be of use to him.

Feb 20th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Nothing can be more unpleasant than to have to put a construction upon very vague and intermediate words, that have never yet received any construction. I shall give as liberal an interpretation in favor of this legatee, who was an old friend of the testator and part of his family, as if it was the case of a wife. I think, he meant to give her the use of the house and furniture for her life, and to make her a present of the stock: but he has unfortunately put the words "during her life" at the end.

Upon the face of the will it is impossible to suppose, the testator did not intend this legatee to live in his house; though perhaps the language is not strong enough to restrain her to living there. I *shall not enter into her capacity of living there: [*313] she might have other funds. It is to be observed, that this is not an absolute gift of these articles, but a limited interest; namely, for life; consequently it is naturally to be supposed not to include any articles, which are consumed by their very use: at least words are not to be extended to such articles, unless they clearly embrace them. The whole here is qualified. I do not mean to say, what "live and dead stock" might mean, if it stood independent of every thing else: but upon the whole of this will taken together I cannot by any fair inference deduce, that the testator did intend under the words "live and dead stock," as they stand here, his books and wine. Consider first what would be the interpretation of these words, if nothing was said of furniture at all. No person could have conceived, that those words preceded by "carriages and horses" would have meant in-door stock, furniture, &c.; which, though dead, could not be coupled and enjoyed with carriages and horses. Therefore it is clear, if those words stood alone, the interpretation would be out-of-door stock. They would mean, corn, hay, straw, carts, &c. If that is so, see, whether the word "furniture" makes any difference: I think not: but it is rather against the legatee. It is necessary to decide what "furniture" embraces; and there I am relieved from all difficulty by the determination of *Kelly v. Powlet*; where Sir Thomas Clarke takes great pains to decide, what should pass under the word "furniture." I believe, this testator by these words meant pretty much the same thing. I perfectly agree with that decision; and after the consideration, that was given to it, it

must be attended to, whether approved or not. When we find a determination upon such words, it is better to abide by it. I cannot but wonder at the determination of *Pratt v. Jackson*, 2 P. Will. 302, by Lord King. The words of the report are not quite accurate. I have taken them from the case in the House of Lords. The proviso, that it should not extend to what the intended husband should or might leave her by will, proceeded thus: "nor to all or any the household goods or utensils of household stuff, rings, plate, jewels, or linen, of him the said Nathaniel Jackson at the time of his death." That decree was, as might have been expected, reversed; and Lord Hardwicke, 3 Atk. 63, says, the House of Lords were never clearer than in that case, that the word "goods" related only to the testator's household goods and furniture, and did not extend to goods in the way of his trade or his goods as a contractor for the [*314] Government. I mean only to say, * that wherever words have got an appropriate meaning, I shall be glad to adhere to that. *Lady Gower v. Lord Gower* is very different from this case; and the others do not apply. In *Lady Gower v. Lord Gower* the words were "which should be in and about his dwelling-house and out-houses." Those words differ from these in this respect: it was perfectly clear, the testator meant to make a general gift of every thing within doors and without; and if this testator meant the same thing, he would have used some such words as "all my live and dead stock in doors and out." If he had meant to add any thing more in-doors to the bequest of the furniture, he would have said "all my stock of wines." But the word "furniture" is decided not to include books or wine. By that word he disposed of every thing he meant to dispose of in the house; and by the other words he meant out-of-door stock. This must never be quoted as a governing case; because it does not determine, what "live and dead stock" may mean, not coupled with other words.

There has been great doubt among Judges, what a person having a limited use of such articles must take. Some learned Judges have thought, they must be sold, and that a person so entitled is to have only the interest of the money. That is a very rigid construction (1).

Declare the Defendant Jane Worthington entitled to the use of all the articles in the schedule except the books and the wine (2).

As it must be evident that there could be no secure limitation over after a life interest given in articles the use of which consists in the consumption, such articles are never understood to be included in a gift generally worded, when the testator has limited the interest of the first taker to a life estate; in fact it would be scarcely possible to say that a specific gift for life of such articles is not a gift of the property; for the use and the property can have no separate existence. *Randall v. Russell*, 3 Meriv. 194.

(1) In this case all the articles had been sold.

(2) As to the restraint of general words, see *post*, *Jones v. Lord Seston*, vol. iv. 166; *Nisbett v. Murray*, *Wilde v. Holtzmeier*, v. 149, 811; *Stuart v. The Marquis of Bute*, ante, 212, *post*, xi. 657; *Rawlins v. Jennings*, xiii. 39; *Hotham v. Sutton*, *Campbell v. Prescott*, xv. 319, 500; *Carr v. Carr*, 1 Mer. 541, n; *Randall v. Russell*, 3 Mer. 190; *Cole v. Fitzgerald*, *Bescoby v. Pack*, 1 Sim. & Stu. 189, 500.

BISHOP OF WINCHESTER v. BEAVOR.

[ROLLS.—1797, FEB. 16, 20.]

THE Court ordered a bill of foreclosure to stand over, to make a judgment creditor, the only incumbrancer, not before the Court, a party; but would not adopt as a general rule the usual practice to make all incumbrancers parties. (a) An infant may be foreclosed, subject only to error, (b) [p. 317.]

THE bill was filed by the first mortgagee against Beavor, the mortgagor, and Skynner and Dyke, the second mortgagees, for a foreclosure. Both the mortgages were in fee; the first was made upon the 6th and 7th of February, 1792; the second upon the 19th of May, 1795. The answer of the mortgagor stated a judgment entered up against him by — Jones in Trinity Term, 1794, and that there were no other incumbrances.

The second mortgagees objecting at the hearing, that the judgment creditor was not made a party, the Master of the Rolls *inclined against the objection; stating the inconvenience, [*315] that would arise from the necessity of making all the judgment creditors of the mortgagor parties to a bill of foreclosure; for whenever such bill is filed, the mortgagor may keep off the decree by confessing a great number of judgments to his friends: but the point being conceived to be of great importance, and the practice being insisted on, it was ordered to be spoke to.

Mr. Lloyd and Mr. Stratford, in support of the objection. A judgment creditor having a general, though not a specific, lien has a

(a) The general, although not universal rule, is that all incumbrancers, as well as the mortgagor, should be made parties, if not indispensable, at least, as proper parties to a Bill of Foreclosure, whether they are prior or subsequent incumbrancers. Story, Eq. Pl. § 193, and cases cited; *Findley v. Bank of United States*, 11 Wheat. 304; *Harris v. Beach*, 3 Johns. 459; *Ensworth v. Lambert*, 4 Johns. Ch. 604; *McGown v. Yorks*, 6 Johns. Ch. 450. But the question seems to be still undecided, whether subsequent incumbrancers are indispensable parties. Story, Eq. Pl. § 193, note; Calvert, on Parties in Eq. 128–138. Perhaps the solicitude of Courts of Equity to make a final settlement of the rights of all persons interested in such a suit has carried them to an extent scarcely justifiable in point of principle or convenience. Ibid. See, also, 4 Kent, Comm. 184, 185, (5th edit.); *Lyon v. Sandford*, 5 Conn. 544; *Rennick v. Macomb*, 1 Hopkins, 277. See, also, 3 Powell, Mortgages, by Coventry & Rand, 989–991, note, where it is said, that those incumbrancers only are necessary parties, of whose liens the mortgagee has notice. And farther, as to parties, see, also, *Cook v. Marcuis*, 5 Johns. Ch. 96; *Hallock v. Smith*, 4 Johns. Ch. 549; *McGown v. Yorks*, 6 Johns. Ch. 450; *Evertson v. Booth*, 19 Johns. 486; *Harrison v. Hall*, 1 Call, 364; *Chapman v. Turner*, 1 Call, 253.

(b) But the most modern practice is a reference (with consent of mortgagee) whether sale will be beneficial to the infant. 3 Powell, Mortgages, by Coventry & Rand, 984, 985, notes. The mortgage of an infant is voidable only, not void. Hence, where an infant mortgaged his land, and, after coming of age, made a deed of the land recognizing and subject to the mortgage, the latter deed was held to be a confirmation of the former one, and the mortgagee recovered judgment against the second grantee. *Boston Bank v. Chamberlin*, 15 Mass. 220; *Hubbard v. Cummings*, 1 Greenl. 11; 1 Hilliard, Abr. 328. See also, *Barnaby v. Barnaby*, 1 Pick. 221; *Roof v. Stafford*, 7 Cowen, 9; *Belton v. Briggs*, 4 Dessaus. 465; *Course v. Birdsall*, 1 Johns. Cas. 127; *Jackson v. Todd*, 6 Johns. 257; *Jackson v. Burchin*, 14 Johns. 124; *Roberts v. Wiggin*, 1 N. H. 73.

right to come to foreclose as a mortgagee. This court has never proceeded in the absence of persons interested in the account: otherwise they would not be bound. The whole account is always to be taken. This is a question, not of strict law, but of convenience on both sides. In all bills of this kind there is an interrogatory; whether there are any and what incumbrancers; and if the answer states any, it has always been the practice to make them parties. There are many cases, in which it is extremely inconvenient to bring parties before the court; and yet the Court of its own authority will not proceed without them. In the case of a devise to sell and divide the money among a hundred different people, the Court will not proceed without the representatives of those, who are dead; though as to personal estate the Court goes no farther than the executor. It might be said, that, as in the case of personal estate, a share might be left in the office: but that rule has never been dispensed with. If a second mortgagee brings a bill to redeem the first, who is willing to be redeemed, it is quite settled, that the Court will not proceed without the mortgagor, because he is interested in taking the account. If it appears by the answer, that there are three or four mortgagees, they must all be parties for the same reason. If the first incumbrancer brings a bill against the mortgagor alone, and there appears to be an intervening incumbrancer, which is nearly this case, the Court will not proceed against the mortgagor for the same reason; though the operation is extremely simple. However inconvenient it may be to the mortgagor, the Court will require it; because the inconvenience is greater on the other side. In this case the difficulty to the first mortgagee is nothing; for it is stated on the record, that there is no other incumbrancer. As to the inconvenience mentioned by the Court, if the mortgagor confessed judgments *pendente lite*, they would be good for nothing. The inconvenience would be the *other way, if judgment creditors were not brought before the Court; for the intervening incumbrancer ought to have an opportunity of questioning them as to the consideration. There are but two cases; *Hobart v. Abbot*, 2 P. Will. 643, and *Fell v. Brown*, 2 Bro. C. C. 276. Several cases of inconvenience and hardship are noticed in the argument of the latter. According to Lord Thurlow's opinion these subsequent incumbrances must be parties to a bill against the mortgagor; for they are mortgagors with respect to the first incumbrancer.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I shall put the objection, I stated the other day, out of the case. A judgment confessed after a bill filed would not do. He has no right to insist upon the equity at least. The mortgagor however might be advised to confess twenty judgments at the time of making the mortgage in order to guard against foreclosure. But an inconvenience has struck me on the other side. To whom am I to give the equity of redemption? To the mortgagor? That will cut out the intervening incumbrancer, and give the mortgagor the legal estate to

keep him off with. That is a difficulty that has not been touched upon, and I have not been able to get over. Certainly the common practice has been to make them all parties. Unless they can show me cases, I will not travel into the question, or vary what seems to have been the course of the Court, in this instance, where there is but this one incumbrancer, and that appears by the answer. I am perfectly satisfied, the general course of the Court and almost universal practice has been to insist upon any one having a right to redeem being made a party; and the principal reason is the gross injustice, that you may compel a mortgagee to re-convey to a mortgagor; where it appears by his own answer, he has no right to it. Therefore I will not exercise my discretion in such a case as this, unless they can show me cases.

Mr. *Graham* and Mr. *Cox*, for the Plaintiff. The objection was over-ruled in *Draper v. Jennings*, 2 Vern. 518. *Sherman v. Cox*, 3 Chan. Rep. 46. In *Needler v. Deeble*, 1 Chan. Cas. 299, it was expressly denied, that the account must be taken over again. In the case put by the Court of a mortgagor redeeming merely to get the legal estate the Court would decree a redemption, but would not re-convey without giving the second mortgagee an opportunity of filing a bill.

*MASTER OF THE ROLLS. One great fault of the case [*317] in *Vernon* is, that it does not state the rule of the Court clearly; for an infant may be foreclosed. You can have your decree against him. He can do nothing but show error. He is foreclosed to all intents. You may go to market with it; and the purchaser is only liable to be overhauled in the account (1).

Where there is only one single incumbrancer, what occasion is there to go out of the common rule? The usual and common practice almost without exception is to make all incumbrancers parties. If I lay down, that it is absolutely necessary, I arm a man with a shield to ward off a foreclosure. But the question is, whether it is not proper in this case: I think, it would be too much to refuse it, where there is no affectation of delay, that I can see. I do not think the general point so clear as to determine it upon this case. I hope, the Court is not bound to insist upon all incumbrancers being parties: but I am perfectly satisfied, that in this case it is by much the least evil to order the cause to stand over, till this single incumbrancer is made a party (2).

[The following note relates to the same case, *post*, 5 V. 113; and to the *Bishop of Winchester v. Paine*, 11 Ves. 194.]

1. In all cases, whether of redemption or foreclosure, the parties entitled to the whole mortgage money must be brought before the Court. *Pulmer v. The Earl of Carlisle*, 1 Sim. & Stu. 425.

2. A decree of foreclosure will bind a mortgagee who becomes such *pendente*

(1) See other authorities, 1 Fonb. Tr. Eq. 82; *post*, *Spencer v. Boyes*, vol. iv. 370; *Williamson v. Gordon*, xix. 114, and the note, vii. 211.

(2) *Post*, *The Bishop of Winchester v. Paine*, vol. xi. 194; xii. 58; 2 Ves. & Bea. 207; 3 Ch. Rep. 47.

lite: and it is not necessary to make such subsequent mortgagee a party to the suit; if it were the proceedings might be rendered interminable. *Garth v. Ward*, 2 Atk. 175; *Metcalf v. Pulvertaft*, 2 Ves. & Bea. 205; *Gaskell v. Durdin*, 1 Ball & Bea. 169. Upon the same principle, the pendency of a suit respecting an estate will affect a purchaser of that estate. *Lloyd v. Passingham*, 16 Ves. 66; *Parkes v. White*, 11 Ves. 236; *Preston v. Tubbin*, 1 Vern. 286. A *lis pendens* is not constituted merely by serving a *subpoena*, unless a bill is actually filed; but the bill being filed, the *lis pendens* commences from the service of the *subpoena*, although that may not be returnable till the following term. *Anonymous case*, 1 Vern. 318. A decree, however, is not an implied notice to a purchaser after the cause is ended, it is the pendency of the suit which creates the notice: and it was declared by Lord Hardwicke, it would be very inconvenient, where money is secured on an estate, and there is question depending in the Court of Chancery concerning the right to, or otherwise in respect of, that money, but no question relating to the estate on which it is secured, the matter being wholly collateral, if a purchaser were held to be affected with notice, by such implication, as, in the eye of the law, the pendency of a suit creates. *Worsley v. The Earl of Scarborough*, 3 Atk. 392. The case of *Self v. Madox*, 1 Vern. 459, is not in contradiction of Lord Hardwicke's rule, that after a decree, final in its nature, there remains no *lis pendens* by which parties, who subsequently purchase the litigated property, can be affected with notice. It is true that, in *Self v. Madox*, a decree had been made, not merely for an account, but ascertaining the right of the plaintiff; still, an option was left to the defendant as to which of two very different modes of satisfaction should be pursued; a farther application to the Court must, therefore, have been contemplated as probable at least, and the case may fairly be considered as a case of *lis pendens*, not as a cause ended. It was said, in *Wyatt v. Barwell*, 19 Ves. 439, that where the holder of a deed affecting lands, situated in a register county, has neglected the precaution of having the deed registered, a *lis pendens* respecting the said lands will not, *per se*, be deemed notice for the purpose of postponing a subsequent deed which has been duly registered: and see, *post*, the note to *Jolland v. Stainbridge*, 3 V. 478.

3. The time first fixed for payment of money due on mortgage is usually enlarged, when the mortgagor is defendant to a bill of foreclosure. *Monkhouse v. The Corporation of Bedford*, 17 Ves. 382; *Renvoize v. Cooper*, 1 Sim. & Stu. 365. And see, *post*, note 3, to *Bastard v. Clarke*, 7 V. 489. This practice, however, is not quite of course, and has been disapproved; *Quarles v. Knight*, 8 Price, 630: it will, therefore, not be extended to a case in which the mortgagor is plaintiff in a bill for redemption; by bringing such a bill, the plaintiff professes that his money is ready, and he cannot be permitted to offer payment at a distant period. *Novosielaki v. Wakefield*, 17 Ves. 418. But though dismissal of a bill brought for redemption, in consequence of non-payment of the money at the day appointed, operates as a foreclosure, dismissal for want of prosecution has not the same effect; the mortgagor may file another bill for the same matter. *Hansard v. Hardy*, 18 Ves. 460.

4. As to taking a decree *pro confesso*, see, *ante*, the notes to *The Attorney General v. Young*, 3 V. 209.

5. That a decree of foreclosure may be made against an infant, giving him a day to show cause, see *Goodier v. Ashton*, 18 Ves. 83; *Spencer v. Boyce*, 4 Ves. 371: but, by consent, a sale may be directed instead of a foreclosure, if that course will be for the benefit of the infant. See, *post*, note 5, to *Spragg v. Binks*, 5 V. 583.

HOLMES v. CRADOCK.

[ROLLS.—1797, FEB. 20, 24.]

A LEGACY upon an express contingency, which never happened, failed, notwithstanding the apparent intention in favor of the legatee. (a)

Condition not to be extended to a limitation over, [p. 320.]

Words not to be rejected, unless repugnant to the clear intention, manifested by other parts of the will, (b) [p. 320.]

WILLIAM SISSON by his will gave and devised all his freehold, copyhold and leasehold, estates in the county of Durham to his cousin Francis Holmes of Darlington, his heirs, executors, administrators and assigns, upon trust to pay to the testator's wife Elizabeth an annuity of 100*l.* for life, in satisfaction of 1809*l.* settled upon her as a jointure; and upon farther trust to pay the residue of the annual profits of the said estates to the testator's son William Sisson during the life of his mother, as he might have occasion for the same; reserving as much, as he Francis Holmes might think necessary for repairs, taxes, fines upon renewal of leases and admission to the copyhold estates, if there should be occasion to renew the same during the life of his said wife; "and if my son should happen to die before his mother without leaving a widow or child, then in trust, that he shall and do pay all such profits of my estate, as should have been paid to my son, to my said wife for her life, except and reserving as aforesaid;" and subject to the said trusts, that the said *Francis Holmes shall stand seised to the use of the [*318] testator's said son William Sisson, his heirs and assigns for ever "subject and chargeable with the legacies hereinafter given and bequeathed to the said Francis Holmes, Elizabeth Lumley and William Sisson of Penshaw;" and because his wife by reason of her ill state of health might have occasion at certain times for more money, than she can bear out of her annuity, he gave to his relation Francis Holmes the sum of 500*l.* out of his personal estate, in trust after six months after his decease to pay her so much of the said sum from time to time with lawful interest from six months after his decease, as she may think fit; and he gave to his wife 50*l.* to be paid as soon as conveniently might be after his decease for mourning and to supply her other occasions, till her annuity becomes due; "and if my son shall die leaving my wife without leaving a widow or any child after his death and my wife's I give and bequeath to my kind friend and relation Mr. Francis Holmes of Darlington the sum of 500*l.* to my niece Elizabeth Lumley the sum of 500*l.* to my relation the Reverend William Sisson of Penshaw in the county of

(a) This seems to fall under the same principle stated in *ante*, p. 302, note (a) to *Scott v. Chamberlayne*.

(b) *Ut res magis valent quam pereant*. Every will is to be so construed that it should rather stand than fall, if such construction can be reasonably put upon it. *Davis v. Taul*, 6 Dana, 53. Every sentence and word in a will must be construed. *Turbett v. Turbett*, 3 Yeates, 187.

Durham the sum of 300*l.* which several legacies I charge upon my real estate hereinbefore limited to my son and his heirs, and I do subject the same to the payment thereof:" but if any of the legatees shall die, before their respective legacies becomes due, the legacy or legacies of the person or persons so dying were directed to become void. He gave to Francis Holmes all his household furniture, money, plate, linen and pictures, in trust to permit the testator's wife to use and enjoy the same, till his son should marry; she giving a schedule to Francis Holmes; and if his son should marry in the lifetime of his mother, upon trust to divide the said goods, plate, &c. between his wife and his son: but if his wife shall die before his son, he gave all the said articles to his son, his executors, &c. that are not sold and disposed of by his wife and son with the consent of Francis Holmes. Then he gave a legacy to a servant, if living with him at his decease "and I give and bequeath to my good friend and relation Mr. Francis Holmes the sum of 40*l.* for mourning." He gave all the rest and residue of his real and personal estate after debts, legacies, &c. paid, to his son William Sisson, his executors, &c.; and appointed his son and his good friend and kinsman Mr. Francis Holmes executors; and he directed, that Francis Holmes might deduct or retain out of his personal estate or the rents and profits of the real estate directed to be paid to his son all [* 319] costs, &c. incurred *in the execution of the trust, and not be answerable for more, than he shall actually receive.

The testator died in January 1773. His wife died in July in the same year. Their son William Sisson died in 1794 above the age of twenty-one, and did not leave either a widow or child; upon which the bill was filed by Francis Holmes for payment of his legacy of 500*l.*; and the question was, Whether he could claim it in the event, that had happened.

Mr. Piggott and Mr. Lloyd, for the Plaintiff. The manner, in which this legacy is given, is a mere mistake. The meaning is, that the legacies are not to be raised during the life of the wife. The words "after his death and my wife's" are superfluous and absurd, unless intended to mark the time of payment; for he had before given to his son the fee-simple of the estate charged with these legacies, subject to an estate for life to his wife. There is therefore no condition precedent. This legatee appears to have been a very favorite object to the testator.

Mr. Graham and Mr. King, for the Defendants. This is a decided case. The point is exactly that in *Doo v. Brabant*, and *Calthorpe v. Gough*, 3 Bro. C. C. 393, 395. There never were stronger cases than those. I admit, in the event, that has happened, the testator did not mean the legacies to fail. It is a circumstance, to which his mind did not advert; *quod voluit non dixit*. There is no possibility to get rid of these words. The construction attempted is unnatural and contradictory to the preceding part. Words, that are contradictory, may be rejected; but not those, that are merely absurd and improvident. That is the distinction.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This is most like the late case of *Denn v. Bagshaw*, 6 Term-Rep. B. R. 512 ; which is a very strong case. I think, I cannot get rid of these words. It is really a legal question : but I will give my opinion, if they do not wish to have a case made.

Feb. 24th. The proposal to have a case made was declined.

MASTER OF THE ROLLS. I am afraid, I must decide against the legatee. I am perfectly satisfied as to the intention : but it is not *sufficiently expressed to enable me to execute it. [*320] The will requires to be very minutely considered. It must be observed, that the testator gives the rents and profits to his son during the life of his mother, not during his own life. Then he takes up the case of the death of the son during the life of the mother. The question is, whether these are legacies at all events to be paid upon the son's dying without a wife or child, or only upon that contingency happening in his mother's life. One cannot help wishing, and straining as far as one can, to support what must be supposed to be the intention : but it is impossible for the Court to indulge speculations against the heir, unless it is manifest, that the testator intended, that these legacies should be raised in the event, that has happened. It has been determined, that conditional limitations shall never be extended beyond what is absolutely necessary from the context of the will, and shall not be supposed to govern any disposition except that, upon which they may naturally be supposed to attach. Therefore if a testator says in his will, that if his wife shall be *enocinte* at his death, and a son shall be born, he gives to that son, and after his death, over, the condition has been construed only introductory of the gift to that son, if born, and not to govern the limitation over. I have tried to extend that principle to this will. If it had been simply a gift to the son for life, then if he should die before his mother without a wife or child, to her for life, and subject to these trusts, to the son in fee chargeable with these legacies, I should have held it an absolute charge at all events upon the reversion, and to be raised, whether he died without a wife or child in the life of his mother or not : but when I read these words "chargeable with the legacies hereinafter given," I am bound to look, what are those legacies ; for he gives no legacies except by reference. Can I reject these words, "leaving my wife," and decide, that he must have intended these legacies to be raised at all events, whether the son survived his mother or not ? I should in my opinion be going much farther, that I am warranted, by totally rejecting words, unless they are repugnant to the clear intention manifested in other parts of the will. Nothing is given but a mere contingency upon a particular event ; and when one considers what the intention might possibly be, there might be a reason for the intention, that these legacies should not arise but in that event. If the son died leaving a wife or child, even the widow was to have no life estate. It is natural to suppose an intention, that she should have it ; but he has thought

fit to make her interest in this estate depend entirely upon a circumstance, which one would not think ought to govern it. When I see such an intention as that, it is impossible for me to say, he might not have the intention, that in that event only these legacies should arise, and in the other the son should have the estate discharged.

The cases decided govern this. Lord Thurlow, I know, in *Doo v. Brabant* gave a strong opinion against any determination of *Calthorpe v. Gough*; and rather intimated, that upon the clear intention he could supply the words, that were wanting in the will before him. It went to law; and the Court of law made the same answer, that I am afraid I must make here. So strong a case as that can hardly be stated. The next case was *Denn v. Bagshaw*. A stronger could not happen. The Court admitted, the intention must have been in favor of the grandson, but felt themselves bound notwithstanding to decide against him under the extraordinary circumstances of that case. To apply the principles of that case to this: I cannot find myself at liberty to regret these words, and if I give any effect to them, these legacies do not arise. Therefore the bill must be dismissed.

Declare, as the Court did in *Doo v. Brabant*, that the legacy of 500*l.* to Francis Holmes did not arise: the contingency, upon which the same was given, not having taken place; therefore dismiss the bill (1).

1. No Court is authorized to make a will for a man: *Humberstone v. Stanton*, 1 Ves. & Bea. 390: nor would it be justifiable to add an implied case to that which is expressed in a will, where the implication is not necessary. *Bayard v. Smith*, 14 Ves. 477. See, *ante*, note 4, to *Blake v. Bunbury*, 1 V. 194, and note 2, to *Stratton v. Best*, 1 V. 285.

2. It is no unusual thing for words of condition in a will to be taken as words of limitation, where there is a remainder over. *Andrews v. Fulham*, 2 Strange, 1092; *Murray v. Jones*, 2 Ves. & Bea. 320. And Lord Hardwicke, in *Avelyn v. Ward*, 1 Ves. Sen. 422, said, he knew no case of a remainder or conditional limitation over of real estate in which, if the precedent limitation, by any means whatsoever, were put out of the case, the subsequent limitation must not take place. So, Lord Kenyon observed, there are many cases in which devises, sounding conditionally, have not been considered as dependent on a precedent condition, but in which the party has taken the benefit devised, whether the event alluded to in connection with the gift has happened or not. *Parry v. Boodle*, 1 Cox, 184, citing, *Jones v. Westcomb*, Prec. in Cha. 316, and *Gulliver v. Wickett*, 1 Wils. 105. See also, *Simpson v. Vickers*, 14 Ves. 341, and the note to that case, *post*. The case of *Lloyd v. Abrahall*, decided by Lord Hardwicke in T. T. 28 Geo. II. (18th June 1754), bears upon this question, it is therefore here below extracted from Mr. Forrester's ms.—"Lands having descended upon Mary Abrahall (wife of Gilbert Abrahall) and her sister, (also a *feme covert*), as co-heiresses, partly from their father and partly from their brother, they and their husbands levied a fine to trustees and their heirs to the use of them and their heirs, limiting the several moieties to the use of each of the husbands and wives for their lives, then for such persons and to such uses as each of the sisters should by will, or other instrument duly attested, appoint of her separate moiety, and for want of such appointment to the right heirs of each. Mary Abrahall, by will dated two years after the deed leading the uses of the fine, being then *enceinte*, and apply-

(1) *Post*, *Parsons v. Parsons*, vol. v. 578; *Pearsell v. Simpson*, xv. 29.

ing her will to her power, not, indeed, by a particular recital, but by using the words *all my real or personal estate which I may or can dispose of*, devised her moiety to the same trustees named in the deed and their heirs, to the use of her husband for life, and from and after the determination of that estate, *for want of lawful issue on the body of her to be begotten*, to the use of the same trustees to preserve contingent remainders during the life of her husband, and from and after his decease to the use of her sister, Benedicta Andrews, for life, remainder to her first and other sons in tail male, remainder, in like manner, to her cousin John Hoskins, (the defendant to the suit,) and all the rest and residue of her estate, real and personal, to her husband. Mary Abrahall was delivered of a daughter, and died in October, 1718, and her husband, Gilbert Abrahall, died in the November following, leaving their said infant daughter, who subsequently died at about the age of seven years. Benedicta Andrews, upon the death of her said niece, entered on Mary Abrahall's moiety; and being advised that the limitations in Mary's will were void, and that, consequently, the whole vested in herself as heir at law to both her sister and niece, by will, dated 5th September, 1741, devised both her own and her sister's moiety to the plaintiff, and died without issue.

"The bill was brought to establish the plaintiff's title to Mary Abrahall's moiety, under the will of Benedicta Andrews, on the ground that the limitation to Benedicta in Mary's will was a contingent remainder, *namely*, in case of *failure of lawful issue* of the body of Mary living at the death of Gilbert Abrahall, which event had not happened at the determination of the particular estate limited to Gilbert, the daughter Benedicta being then living; and it was also urged, that the limitation could not enure as an executory devise or future use, for then it must be understood as intended after a general failure of issue, which would be too remote.

"Lord Hardwicke said, 'This case had at first such an appearance of difficulty, that I thought I should be obliged to send it to a Court of law; but now I deem that unnecessary. There can be no doubt of the intent of the testatrix Mary Abrahall, which certainly was that her own issue should in the first place take her estate, and that afterwards her collateral relations should have it, as mentioned in the appointment: the consideration is, whether that intent can, or cannot, take effect. The object of the fine levied of the estate which descended upon the two sisters as co-heiresses, (as appears by the deed leading the uses thereof,) was to give them such power of making appointments of the inheritance as might answer any exigency of their respective families. This goes a good way towards furnishing light for the construction of the appointment afterwards made by Mary Abrahall; for her will was certainly only an appointment by a *feme covert*, by virtue of a power over a trust estate, (see, *ante*, note 3, to *Fettiplace v. Gorges*, 1 V. 46.) It was said, indeed, that if this was a trust-estate it became so by accident, by the limitation of an use upon an use, in the deed leading the uses of the fine. It may be so; but the law is settled that such a limitation is a trust by construction, whether it was originally intended to be so, or not; in either case it must be directed by the rules of equity, and executed by subpoena. I shall, however, consider this question under two heads:—first, as it had been a devise of a legal estate, which it is not; and secondly, as what it is, not a devise, but an appointment by virtue of a power reserved over a trust estate. As to the first head, if this had been a devise of a legal estate, what would have been the operation? This question was put in three different ways; first, whether any estate tail could arise by implication to Mary's daughter, by force of the words *for want of issue on the body of Mary to be begotten*; secondly, whether the devise to Benedicta Andrews was a contingent remainder depending upon Mary's dying without leaving issue; thirdly, whether it was a vested remainder, or could be good by way of executory devise. But the second and third queries may be laid out of the case; for, as a contingent remainder it could never take effect, the specified contingency not having happened when the particular estate determined, the daughter of Mary being alive at the time when Gilbert the tenant for life died: and as an executory devise it could not take place, for according to that construction it would be too remote. This brings it, therefore, to the first question, whether any estate tail could arise by implication to the issue of the testatrix Mary Abrahall. I think there is no absolute necessity to determine this

CAMPBELL v. FRENCH.

[1797, FEB. 24.]

TESTATOR by his will gave legacies to A. and B. describing them as grand-children of C. and their residence in America: by a codicil he revoked these legacies; giving as a reason, that the legatees were dead: that fact not being true, they were held entitled upon proof of identity. (a)

A married woman, living in America, being entitled to a legacy, a commission to examine her would have been directed: but as she had been examined under a commission, issued by the American Government, that was considered sufficient, [p. 321.]

Legatee entitled notwithstanding a mistake of his name, (b) [p. 322.]

Legacy to a married woman, subject of a foreign state paid to the husband; to whom it would by the law of that country belong, (c) [p. 323.]

THE will of the testator, dated London, 23d of August, 1790, and disposing of personal estate only, contained the following clause:

"As I understand, that my late sister Margaret Bell has two grand-children living in Northumberland county, Virginia, [* 322] within * three miles of North Cherry Point Church, whose names are Price Campbell, a grandson, and Pinkston Campbell, a grand-daughter, I give to each of them 500l."

A codicil, dated the 5th of January, 1791, contained the following clause:

"And as to the legacies or bequests given or bequeathed by my will to my sister Margaret Bell's grand-children, I hereby revoke such legacies and bequests; they being all dead."

The fact of the death of the legatees was not true. Pinkston Campbell married William Atkins in America. The bill was filed for an account and payment of these legacies.

Evidence proving the identity of the Plaintiffs was read.

Mr. Lloyd and Mr. Harvey, for the Trustees, Defendants. This is a question proper for the decision of the Ecclesiastical Court. It is not upon the construction of the codicil; but whether it is a revocation of the bequest or not; and it is concerning personal estate only. There are many cases of devises of real estate, where upon the misrepresentation of a fact to the testator by an interested person this Court has interfered: but there is no evidence of misrepresentation, nor showing, why he used this expression. Conversa-

(a) If a man, by a subsequent will or codicil, make a disposition different from a former one, under a false impression, the impulse of which is the foundation of his wish to change his former intent, such an act will be considered only as effecting a contingent presumptive revocation, depending on the existence or non-existence of that fact. 1 Williams, Exec. 93. *In the goods of Moresby*, 1 Hagg. 378.

(b) *Falsa demonstratio non nocet, cum de corpore constat*. See, ante, note (a) *Standen v. Standen*, 2 V. 589.

(c) See 2 Williams, Exec. 1018.

tion between strangers is not evidence as to matters of pedigree ; though in the family it is.

LORD CHANCELLOR [LOUGHBOROUGH]. One witness speaks from personal knowledge of both these persons. He speaks to their names and the place of their abode. The will speaks as to their being grand-children of Margaret Bell. The will connects them sufficiently : he identifies the two persons of that name living, where the will describes. It is not a question of pedigree : it is only a question of personal identity. It is only a question, whether they are alive. They take as grand-children, not as being particularly named. If the testator had even mistaken their names, yet if the fact was, that there were two grand-children of Margaret Bell living there, they would have taken (1). The only possible *doubt [*323] would be, if there were other persons answering the description. This is not a question peculiar to the Ecclesiastical Court. I must determine upon the same rule with regard to the construction, that the Ecclesiastical Court would. The Ecclesiastical Court could not avoid proving this codicil as a testamentary paper. It appears to me, there is no revocation : the cause being false : whether by misinformation or mistake is perfectly indifferent.

There must be a proper authority from these persons to receive their legacies ; and one being a married woman living abroad, what ought to be done ? I think, in some late case of that kind the consent was dispensed with. No doubt, I could send a commission abroad : but it depends a little upon the law of the country, where the party resides, whether it might not be paid to the husband. I think, there was before Lord Thurlow a case of a legacy to a married woman in the Prussian dominions and being a Prussian subject ; and it being stated that by the law of Prussia, when the money got there it would belong to the husband, the money was paid to him. But I rather believe, in America they dispose exactly in the same way, as we do.

Declare the legacies not revoked, the parties being alive ; and let a commission issue to take the consent of the married woman ; and upon the issuing of that commission I will give you an opportunity of examining more particularly as to both of them.

It appeared afterwards, that a commission had issued from the Government of Virginia upon affidavits as to the identity of the legatees ; one of which was sworn by a person, who had educated them. Under that commission Mrs. Atkins consented to the power of attorney to receive the legacy executed by her husband.

LORD CHANCELLOR [LOUGHBOROUGH]. This is much better evidence of the identity than the witnesses examined in this cause. I think, the expense of a commission may be saved. This is a very regular proceeding.

*Direct the executors to transfer the legacies to the Accountant General with liberty to the legatees to apply by petition

(1) *Parsons v. Parson*, ante, vol. i. 266, and the note, 267.

upon these documents for payment; and I think, I shall order it without a commission (1)

1. WHEN an instrument, revoking legacies, bears evidence upon the face of it, that it was entirely grounded upon misinformation or mistake, the bequests made by the will may remain good. But where a testator assigns, as a reason for his revocation, not only doubts whether the objects of his once intended bounty are alive, but also, whether they may not, even if living, be well provided for; a revocation grounded on this double uncertainty must take effect: and a Court of Equity will not inquire whether the legatees are, or are not, well provided for. *Attorney General v. Ward*, 3 Ves. 331. The testator will be understood to have determined to quist his own doubts, and to settle them on some certain foundation, not leaving them to be litigated after his death. *Attorney General v. Lloyd*, 3. Atk. 552.

2. That a legatee, who can be clearly identified, will be entitled to his legacy, notwithstanding the testator has mistaken his name; see *Stockdale v. Bushby*, Coop. 229: see also, *post*, note 2, to *Stanley v. Stanley*, 16 V. 491. And as to the admission of evidence, to show what individual a testator really meant, when he has used a wrong or an ambiguous denomination, or description of the intended legatee; see, *ante*, the notes to *Parsons v. Parsons*, 1 V. 266.

3. The terms upon which Courts of Equity, here, will hand over to a man who is a subject of a foreign state, and resident there, interests claimed by him in right of his wife, will depend upon the laws of that foreign country. *Sauer v. Shute*, 1 Anstr. 63.

BRADLEY v. PEIXOTO.

[ROLLS.—1797, MARCH 10.]

A CONDITION inconsistent with the gift is void; therefore upon a bequest to A. for life, and at his decease to his heirs, executors, &c. but if he attempts to dispose of the principal, over, he takes the absolute interest; and the condition, being inconsistent with it, is void. (a)

Condition, that tenant in fee shall not alien, or that tenant in tail shall not suffer a recovery, is void, [p. 325.]

An exception of the thing, that is the subject of the gift, is void, [p. 325.]

THIS cause arose upon the following disposition by the will of Thomas Bradley:

"I give and bequeath to my son Henry Bradley the dividends arising from 1620*l.* of my Bank stock for his support during the term of his life: but at his decease the said 1620*l.* Bank stock, principal and interest, to devolve to his heirs, executors, administrators and

(1) See Mr. Beames's Elements of Pleas in Equity, 198, 9.

(a) See 2 Williams, Exec. 908; *Cuthbert v. Purrier*, Jacob, 415; *Ware v. Cann*, 10 B. & C. 433; *Newton v. Reid*, 4 Sim. 141; *Massey v. Parker*, 2 M. & K. 174; *Billing v. Billing*, 5 Sim 232. Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee, or by devise, that the purchaser or devisee should not alien, is unlawful and void. The restraint is admitted in leases for life or years, but it is incompatible with the absolute right appertaining to an estate tail or in fee. 4 Kent, Com. 131, (5th edit.) So in a bequest to a daughter, with a proviso, that if she attempted to sell or dispose of it, it should be void, the restriction was held to be of no effect. *Newton v. Reed*, 4 Simons, 141.

assigns. Having observed during the term of my life so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessities of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the Bank stock, the dividends from which is bequeathed to them in this will and testament for their support during their lives, such an attempt by my wife or any of my children shall exclude them, him or her, so attempting, from any benefit in this will and testament, and shall forfeit the whole of their share, principal and interest; which shall go and be divided unto and among my other children in equal shares, that will observe the tenor of this will and testament."

The bill was filed by Henry Bradley against one of the daughters of the testator, who had taken out administration. The prayer of the bill was, that the Defendant might be decreed to transfer the 1620*l.* Bank stock to the Plaintiff. The other children were out of the jurisdiction.

* MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. [* 325]

(1). The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the Plaintiff does not comply; and the question is, whether by the rules of this Court he can demand the legacy, not complying with the injunction, the testator has laid upon him; or rather whether the condition is consistent with the gift. Seeing the father's intent so clearly and strongly expressed I have taken some time to consider this case; and have endeavored to satisfy myself, that I am at liberty to refuse the Plaintiff the demand, which he now makes. Indeed another reason for delaying my judgment was, that there appeared to be other children, who were interested in this question and were not parties to the cause. The reason given for not having them before the Court is, that they are all out of the jurisdiction. Had they been in this country, I should have expected them to have been made Defendants, to sustain their interests: but as they live abroad, the cause has proceeded without them; and according to the opinion, I have formed of this case, they are not necessary parties; because I feel myself obliged to say, that the proviso, I have before stated, is of no effect.

I have looked into the cases, that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition, that tenant in fee shall not alien, is repugnant; and there are many other cases of the same sort: *Piers v. Winn*, 1 Vent. 321. Pollexf. 435. The report in *Ventris* is very confused: but it appears clearly from the report of

(1) The reporter, not having been present, was favored with a note of the judgment by a gentleman, whose accuracy is universally acknowledged.

all my estate at Cold Ashby in the county of Northampton to my late husband's brother the Reverend Charles Kipling, clerk, his heirs and assigns for ever; and I give all my plate, linen, and china, to the said Charles Kipling." Then after giving to Penelope Kipling, daughter of the said Charles Kipling, her watch, rings and wearing apparel, "I also give and devise all my real and personal estate wheresoever and whatsoever not hereby otherwise disposed of, with the appurtenances, also money in the public funds, unto my good friend George Conibeere of the city of Gloster, upholder, his heirs, executors, and administrators, in trust to and for the several uses, intents, and purposes, hereinafter named: that is to say, as soon as conveniently may be after my decease to make sale thereof, and after paying charges of such sale out of the produce thereof in the first place to pay all my just debts, funeral expenses and charges of proving this my will: and in the next place to retain for his own use as a token of my esteem and regard the sum of 20*l*.; and I do desire and direct the said George Conibeere, his heirs, executors, and administrators, to pay to my worthy friend Joseph Peach of Northampton, woolstapler, all money due to him upon mortgage of my estate at Guilsborough, as also over and above the principal and interest due thereon the sum of 20*l*. as a mark of gratitude for his trouble in having received my rents; also to the trustees of the Methodist chapel, commonly called the Reverend John Wesley's Preaching House, in Gloster, the sum of 100*l*. for the liquidation of a debt in part upon the said preaching house." The testatrix then gave legacies of 50*l*. to the infirmaries of Gloster and Northampton, and of 20*l*. to the poor of the parishes of Staverton and Guilsborough; and then after some small legacies to individuals and some directions concerning a monument for her husband, "and I do direct my executor, in case a sufficiency remains, to pay 300*l*. to such of the children as shall be living of Edgcomb Daniel of Bilton near Rugby in Warwickshire, yeoman, to be equally divided among them; and also to pay 500*l*. to the sons of the clergy in London according to the will of my late uncle James Horton of Guilsborough; but in case of a deficiency I direct only what shall remain to be paid to the sons of the clergy; and if any overplus after payment of my debts, funeral expenses, charges of proving my will and legacies, I direct my said executor to pay such overplus to the poor of the said parish of Staverton not receiving from the said parish." She appointed George Conibeere executor.

[*329] *Codicil. "By way of codicil to my will I give to my brother's son Charles Kipling jun. the 300*l* designed for Edgcomb Daniel's children, as I know not whether any of them are alive and if they are well provided for. I likewise give my sister Kipling 20*l*. for mourning and my sute of best lace; likewise to Mr. John Kipling by token of friendship, for he wants nothing: to Mrs. Coopy my great Bible; to Mrs. Jones my clock and Doctor with notes: witness my hand Sarah Kipling, this 7th day of February 1795—The bible are in the portmantua."

This codicil was not properly attested to affect real estate.

The testatrix died upon the 4th of April, 1795. Conibeere, the executor, filed the information and bill; praying an account of the personal estate; that the Defendant Ward, who had contracted for the purchase of the Guilsborough estate, may complete his contract; and that the purchase-money may be applied in discharging the debts, funeral expenses, and such legacies, as are effectually charged upon the said estate, or so much as the personal estate shall be insufficient to discharge. Charles Kipling the elder claimed as heir at law of John Kipling. The legacy of 300*l.* was claimed both by the children of Edgcomb Daniel and by Charles Kipling the younger.

Attorney General [Sir John Scott] and Mr. *Allcock*, for the children of Edgcomb Daniel. This is not a case depending upon the statute of Frauds. The terms prescribed by the power must be pursued. The testatrix has effectually charged this estate with 300*l.* for these children: can they be deprived of it by an instrument not executed according to the power? But even if it was upon the statute of Frauds, this is not like *Brudenell v. Boughton*, 2 Atk. 268. In *Habergham v. Vincent* (*ante*, Vol. II. 236, 7) the Lord Chancellor qualifies that doctrine; and restrains it to cases, where the real estate is charged in aid of the personal, not as the primary fund. In this case the land is as much the primary fund as the personal estate. The testatrix was mistaken in the fact of the death of the legatees; which is the ground of the revocation of the legacy.

Mr. *Grant*, for Charles Kipling the younger. There is no difference between this and *Brudenell v. Boughton* and the cases, that followed it: nor does the power make any difference. It was as *competent to her to dispose by will, as if she was [* 330] absolute proprietor. She had just the same power to dispose by a will duly attested as the owner of lands has by the statute of Frauds. This is not given in the shape of a charge upon the land, but operates as such charge only by construction; because she has directed a sale and the produce with the personal estate to be a general fund for payment of debts and legacies. By the general clause at the end the residue is only to be paid over after payment of the debts and legacies. Then it comes within Lord Hardwicke's reasoning in *Brudenell v. Boughton*. The testatrix has turned this real estate into personal; as in *Mallabar v. Mallabar*, For. 79. *Durour v. Motteux*, 1 Ves 320, and *Ogle v. Cook*, cited 3 Bro. C. C. 592.

Reply. It is one thing to dispose of her own estate, and another to divest by the execution of a power. This is more like *Masters v. Masters*, 1 P. Will. 421, than any of the other cases. The principle of that case is, that if the testator does not charge his legacies generally, or such as he gives by that paper or shall give by any other paper, but if the context shows, he meant to charge those legacies, that he mentioned in his will, the Court will not carry it farther, or charge any other legacies. This testatrix has not generally charged her legacies; and did not mean to charge any legacies but

such as she gave by that will. *Brudenell v. Boughton*, was thought in *Habergham v. Vincent* to go full as far as the Court is warranted. The point is reduced to this ; whether this legacy is revoked. If it is, it is not given to Kipling ; and because it is not given to him, it is not revoked ; for she did not mean to revoke it unless to give it to Kipling ; and she cannot give it to him or any one without giving it by a will attested by three witnesses.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I do not feel much difficulty upon this question. Upon the view, I now have of the case, it is neither more nor less than a legacy charged upon a fund to be comprised out of the sale and produce of the real estate and the personal estate mixed. It is not a residue. I do not agree, that the real estate was turned into personal at all events : but it is real estate charged in aid of personal. No more ought to be sold than is sufficient to pay the charges upon it. With regard to the residue, the disposition of which is void, as far as it respects real estate, being for a charity, after payment of [* 331] the debts and legacies, it will go to the * heir ; who will have a right to take it as real estate, paying the charges (1).

The next question is as to the substitution of Kipling in the room of the children of Edgcomb Daniel. If this was a legacy charged only upon land, nothing can be clearer, than that it could not be altered either as to the *quantum* or the person by any will but such as would have affected land : but being upon a mixed fund and once well charged, the testatrix may afterwards modify or alter it, as she thinks fit. If a testator says, he charges all the legacies given by his will upon his real estate, and gives 20*l.* to A., he may by an unattested codicil give that legacy of 20*l.* to B. : it has been determined, that you cannot create new legacies : but you may modify or alter any before given. You cannot give fresh legacies upon land, unless future legacies are charged : but you may substitute one for another (2).

After the opinion, I have given, that this substitution may take place, the next question is, whether this codicil is at all events a substitution ; and upon reading it with some attention it is impossible to say, it is not a complete revocation of that legacy. It is an absolute gift of the legacy designed for Edgcomb Daniel's children ; and the reason accompanies it. It was argued, and with some ground, that if it had rested upon her not knowing, where they were living, there would be good reason to contend, that it fell within the case of *pator credens filium suum esse mortuum* (3) : but she goes farther ; that she doubted, if they were living, whether they might not be well provided for ; and she totally deprives them of that provision. The Court will not inquire whether they are well provided for or not.

(1) *House v. Chapman*, *post*, vol. iv. 542.

(2) *Post*, vol. xviii. 167.

(3) *Campbell v. French*, *ante*, 321.

Therefore declare, that the legacy of 300*l.* given by the will to the children of Edgcomb Daniel is revoked by the codicil, and is well given by the codicil to Charles Kipling the younger; that the gift of the residue of the money arising from the sale of the testatrix's estate after payment of the debts, funeral expenses and legacies, being given to charitable purposes, is void by the statute: and that the same belongs to Charles Kipling the elder, heir at law of the testatrix's husband, according to the deed.

A doubt was suggested in the course of the argument [*332] by the Attorney General, whether the heir at law of the testatrix was not entitled. No such party was before the Court; and it was said, that advertisements had been published and no heir could be found.

The Court at first inclined to reserve farther directions as to the question, to whom the residue would belong, and to direct the Attorney General to be made a party; but a few days afterwards the point being given up, and the Attorney General declaring himself satisfied, the decree was made as above.

See, *ante*, notes 4 and 5, to *Habergham v. Vincent*, 1 V. 68: notes 2, 3, and 4, to *Kidney v. Cousmaker*, 1 V. 436; and note 1, to *Campbell v. French*, 3 V. 321.

PICKERING v. LORD STAMFORD.

[ROLLS.—1796, FEB. 8, 12, 16. 1797, FEB. 9; MARCH 15.]

TESTATOR gave his wife real and personal estate in bar, full satisfaction and recompense, of all dower or thirds, which she can have or claim in, out of or to, all or any part of his real and personal estate or either of them: he gave the residue to four persons, and afterwards by a codicil directed them to dispose thereof in charities: part of the residue, being invested in real securities, goes according to the Statute as undisposed of; and the widow is not barred. (a)

Testator gave real and personal estate to one daughter in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate: he also gave a provision to his wife in full of her dower, thirds, or other claim at law or in equity or by any local custom to any other part of his real or personal estate: the residue to his other daughter: upon her death in his life he by codicil gave it according to the appointment of his wife: the power not being duly executed, the residue goes according to the Statute as undisposed of; and the widow and daughter are not barred, [p. 335.]

Husband dying intestate, the widow is bound by her contract not to claim under the custom of London, [p. 336.]

Devisee dies in the life of the deviser, and the estate descends: the deviser's widow, being entitled by the will to a provision in bar of dower, must elect, [p. 337.]

Chester not having been within the province of York at the time of Hen. VIII. is not within the custom, [p. 338.]

THIS cause (reported *ante* Vol. II. 272, 581,) came on upon a petition of re-hearing by the personal representative of the testa-

(a) The widow's title, under the statutes, may be barred by a settlement before marriage, excluding her from her distributive share of her husband's personal

tor's widow against so much of the decree as excluded the widow from any share of so much of the residue of the testator's personal estate, as was vested in real securities, the disposition of which to charitable purposes was void; and which was declared to be devisable among the next of kin.

The clause of the will, upon which it was insisted that the widow's right was barred, was that, by which after giving certain parts of his real and personal estate to his wife, he declares, the provision he has thereby made for his said wife, is and shall be in bar, full satisfaction and recompense, of all dower or thirds, which his said wife can have or claim in, out of, or to, all or any part of his real and personal estate or either of them.

By the codicil an additional bequest was given to the wife in terms of favor and affection.

Mr. *Grant*. Mr. *Anstruther*, and Mr. *Richards*, against the decree. The testator has died altogether intestate as to this property; which must be distributed entirely upon the statute without any regard to his intention. It is not the case of an undisposed residue; for there is a difference between not making a complete disposition [*333] and a disposition, that by an unforeseen accident * totally fails. Where an executor is appointed, there is no intestacy: he takes either beneficially or as trustee. But here the object he had in view failing, the will as to so much is completely disappointed. It is like the case of a lapsed legacy; and there is no rule to go by but the statute.

But if the intention is to be regarded, there is no intention to exclude the wife in the event, that has happened. The intention upon the supposition, that the charity could take, cannot be applied to a case in which they cannot take. He bars his wife from this supposed claim for no other purpose than to protect that charitable legacy. It is not a general exclusion; not like an exclusion from dislike, as in the case of a bequest of a shilling, showing a wish, that the estate shall go any where rather than to the particular person. This testator shows great favor to his wife. Suppose, he had annexed such a clause to the legacy, he gave to each of the next of

estate. And whether the husband die intestate, or dispose of his personal estate by Will, which disposition fails by lapse, the wife will be equally excluded from her distributive share. 2 Williams, Ex. 1063; *Colleton v. Garth*, 6 Sim. 19. But it is otherwise, when the husband, as in the present case, by Will makes a provision for his wife, stating it to be in lieu and in bar of all her claims on his personal estate, and then subjects his personalty to a disposition which lapses, or is void, so that the latter fund is subject to distribution; for then, notwithstanding the words of the Will, the widow is entitled to a share under the statute. The principle of this distinction is, that where a woman has before marriage agreed to accept a consideration for her widow's share, she is bound by her compact, whether her husband die testate or intestate; but where there is no such contract, but the provision in bar of the distributive share arises upon the husband's Will, it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator; namely, for the benefit of the person in favor of whom the property was bequeathed by him, so that if the purpose be disappointed, there is no reason why the bar in exclusion should continue. *Ibid*.

kin: would that have excluded every one, to whom the Statute of Distribution gives the property in case of intestacy? The words of exclusion must have been disregarded. *Davers v. Dewes*, 3 P. Will. 40. *Sympton v. Hutton*, 11 Vin. 185; 2 Eq. Ca. Ab. 439. In that case there was the same mistake as to the daughter's supposed claim, as this testator has made as to the supposed claim of his wife. In *Turner v. Ogden* (1), decided by your Honor upon a re-hearing 11th of March, 1794, the testator declared, his relations should have nothing to do with his housen; which he had given to a charity: being leasehold premises, Lord Kenyon decreed in favor of the executrix: but your Honor reversed that decree; and gave it to the next of kin according to the statute; relying upon the distinction taken in *Bennet v. Batchellor*, (*ante*, Vol. I. 67) between a lapse and a residue undisposed of. The words of exclusion therefore did not operate; being inserted only in favor of the charity. *Hale v. Cox*, 3 Bro. C. C. 322, was upon the same principle. *Beard v. Beard*, 3 Atk. 72. *Nichols v. Crisp*, Amb. 768 (2). *Creswell v. Byron*, 3 Bro. C. C. 362. In *Arnold v. Chapman*, 1 Ves. 108, the intention failing, the subject went as the law would carry it. The *widow had a legal vested interest; and there is [*334] no reason to take it out of her in favor of the next of kin.

Mr. *Graham*, Mr. *Stanley*, and Mr. *Thomson*, in support of the decree. There is plain language against the widow; the simple sense of which is, that she shall have that provision in bar of every thing, she can claim by way of right out of either the real or personal estate. That distinguishes this case from most of those cited. Where the testator excludes any one of the next of kin in every possible event, the law of this Court will consider that person as naturally dead. *Davila v. Davila*, 2 Vern. 724. *Vachel v. Breton*, Pre. Ch. 169. 1 Bro. P. C. 167. *Cleaver v. Spurling*, 2 P. Will. 526. In *Sympton v. Hutton* there was decisive evidence from the new disposition by the codicil according to the appointment of the wife, that the daughter was not intended to be excluded from that new right acquired by accident under the codicil, which he could not have contemplated when making the will. This point does not appear in the report of that case 2 Vernon; and by the Register's Book this point seems to have passed *sub silentio* (3). If he had foreseen this consequence, he might perhaps have said, his wife should have something more: but he has not said so; and in that respect it resembles *Calthorpe v. Gough*, 3 Bro. C. C. 395, n.; which

(1) Stated by Sir W. Grant, Master of the Rolls, *post*, xv. 417, 418, in *Dawson v. Clark*.

(2) The Master of the Rolls observed, that the report of that case was not correct. The testator directed the estate to be turned into money for the benefit of his natural daughter. That purpose failing by the death of the child in the life of the testator, Lord Bathurst held, there was no reason to convert the estate into personal property; but that it descended to the heir, subject to the charges upon it. *Post*, vol. iv. 65; *ante*, *Robinson v. Taylor*, i. 44, and the notes, in pages 45 and 204.

(3) See this case stated by the Master of the Rolls, *post*, 335.

was a very hard case. Where there is a gift to the wife in bar of her customary share, it puts her quite out. *Lewin v. Lewin*, 3 P. Will. 15. *Creswell v. Byron*, was upon the word "dower," applicable to real estate only.

Reply. In case of an undesigned intestacy there is no instance of referring to the intention: the statute has always been the rule of distribution. There is a clear disposition of every part of the property; and if any part of that fails, so far his intention is removed entirely out of the way. The next of kin claim upon the ground of intestacy; and yet they treat it as a question of intention. *Simpson v. Hutton* is a direct authority. As in that case, this is a new right arising by accident under the codicil; for if the codicil had not been made, both the next of kin and the widow would have been excluded. The exclusion was limited and qualified; and not intended to apply to the case, that has happened.

Feb. 9th. MASTER OF THE ROLLS, [Sir RICHARD PERP [*335] PER ARDEN]. * I intended to give judgment in this cause: but upon very full consideration of the case of *Simpson v. Hornsby and Hutton* from the Register's Book (1) I doubt, whether that case does not bear more upon the point now in question, than from *Viner* and 2 *Equity Cases Abridged* might have been conceived. It was the only case, that made any doubt in my mind as to the opinion, I formed upon the former hearing of this cause; and my doubt is now, whether that opinion can be supported without shaking that case: if not, I shall hardly think myself at liberty to vary from it. The only question, that seemed to create a doubt in that case, as it appears in the Register's Book, was, how far Jane the daughter was excluded: but it was not merely an exclusion of the daughter: there were similar words of exclusion as to the wife. The case was this. Thomas Addison by his will reciting, that he had once intended to have made his daughter Jane co-heiress and equal sharer with his other daughter, but having married without his consent, he gave her certain provisions out of his real and personal estate; all which estates, leases, tithes and money, before devised to his daughter Jane and her issue, were thereby declared to be in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate. He then devised to his wife; and gave her furniture and other things; all which devises and bequests he declared to be in full of her dower, thirds and other claim at law or in equity or by any local custom to any other part of his real or personal estate. He gave the residue to his other daughter; who died in his life-time, leaving one child; who was the only person that could be entitled under the *Statute of Distribution* besides the wife and the excluded daughter. By a codicil he gave the residue to his wife for life, with power to dispose of the same after her decease with the approbation of the trustees. Having this limited power she made a disposition

without the consent of the trustees. The decree declares, that Frances the widow having disposed without the consent of the trustees, had not pursued her power; therefore the testator died intestate as to the residue; which ought to go according to the *Statute of Distribution*, viz. in thirds; one third to the Plaintiff Sympson in right of his wife Jane; one third to the child of the deceased daughter; and one third to the devisee of the widow.

If this is warranted, it goes a great deal farther than the book in support of the widow's claim; for if these words were not *sufficient under the circumstances to bar the widow, [*336] I am afraid, I cannot adhere to the opinion, I formerly gave; which was a very doubtful one; and though I still think, strong reasons may be given in support of that judgment, yet I am afraid, without shaking that case I cannot adhere to it. I should wish to hear some observations from the Counsel upon it.

March 15th. Mr. Graham, for the next of kin, endeavored to distinguish this case, as depending upon more comprehensive words than *Sympson v. Hornsby*; in which rights vested in the wife were intended; and there was nothing to bar her from what would devolve to her by law for want of other disposition.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. I feel so strongly overborne by this case, which is a judgment upon very serious consideration, that with the doubtful opinion I entertained before, I do not know how I can help acquiescing under it. It is very ill reported. This point is not reported at all: but only that about the daughter. The case must occur every day with regard to wives, that are barred by contract. I am not ashamed to retract my opinion; and am very glad, I took time to look into this case.

As to this point, that now stands for a re-hearing, the codicil to the charity makes no difference. The question really is, whether, if all the four residuary legatees, to whom he had given the residue jointly, which would therefore have gone to the survivor, had died in his life, his widow would have been barred from any share. The charity was merely substituted for them; and failing, it is the same as if never given. When this cause was first argued (and it was very well argued even upon the first hearing) I had thought, and I believe I so expressed myself, that it was a point of great difficulty and nicety: but upon the consideration then given to it, and the authority of those cases, which were much relied upon by the next of kin, respecting the custom of London, that where a widow has agreed to accept a consideration for her widow's share, though the husband dies intestate, yet she should not be at liberty to claim her widow's share, I was led to think, the same doctrine would apply to the case, where, not with a view to guard against intestacy, but by some provision, he had put her in the same situation of a contract before marriage; and that it would be a bar, let the *circumstances, under which the claim might arise, be [*337] what they might. Great difficulty occurs to me upon this case: if a man devises his real estate from his heir, after giving

his widow a provision in lieu, satisfaction and bar, of dower, and the devisee dies in the life of the devisor, is there any doubt that the heir would take the estate, and bar the widow of dower? (1) That is not doubted; and yet it is extremely difficult not to argue in favor of the widow in that case, as in this it is argued against the next of kin. I have turned that much in my mind; and I am not prepared to say, I could in that case decide in her favor. She could not say, her dower was intended to be satisfied only in favor of that devisee. I am perfectly sure, that case has happened in point of fact; and no such argument has been raised for the widow. In case of a contract before marriage, that the wife shall not claim either dower or personal estate, it is not merely to give the husband power to dispose of it; for it is determined upon the custom of London, that he shall be barred though he does not give it away: it is exactly as if there was no wife; and the next of kin take without any reference to her. That having been determined, I thought the principle applicable to this case. My opinion was not one, that I took up without some doubt upon it. Upon the re-hearing it was more fully argued; and my opinion was rather more shaken: but I am now decided by having found the very point determined by Lord Cowper; who was of opinion in the case, I have cited from the Register's Book, that where a testator had given to his wife that provision, which he meant to be a satisfaction for any claim, she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow. After that I cannot upon such a point set up my own judgment against Lord Cowper's. Therefore I think, my former determination was wrong. Many reasons may be urged for and against it. The cases I have put of the heir at law and the contract before marriage seem to govern it: but there are distinctions. Personal representatives do not take as an heir at law: who is the person pointed out by the law, unless the testator by devising points out another. The testator must be supposed to mean it in favor of his real estate at all events, and into whosoever hands it shall come. As to the personal estate, the testator must be supposed to imagine, as he certainly did, that his wife had some claim out of his personal estate. There may be some reason for it; for he lived in the county of

[*338] Cheshire, *which is part of the province of York; and a vulgar error prevailed, that the custom of York goes through the whole province. The Legislature themselves fell into it by reserving to the citizens of York and Chester the customs of those cities; the latter of which has no custom. When by another act they repealed that as to the city of York, they left Chester just as it was by the first act. That custom of York never attached upon any part of the province, that was not so at the time of Henry VIII.; and Chester was annexed since that period. (a)

(1) *Wake v. Wake*, ante, vol. i. 335, and the note, 337.

(a) Chester is situate within the Archdeaconry of Chester, which was part of

The difficulty seems to be this: supposing, the testator had said the same as to his next of kin; that imagining, they had some customary share, and acting upon that, he had said, the disposition to them should be a satisfaction for their shares; what could the Court have done? Must they have said, it should be the same, as if he had died without leaving any person, who could take? The Court must have let them in; and could not have excluded the widow; and Lord Cowper thought it something analogous to that. I must take the opportunity of saying *Vachel v. Breton* does not militate against that; for there it might fairly be held, that the exclusion was for the purpose of giving a benefit to the others. In *Turner v. Ogden*, Lord Kenyon gave it to the wife, not upon this principle, but as executrix beneficially. This was not the question there. I differed from Lord Kenyon; because I thought it clear, that it was never meant by the testator, that she should be beneficially entitled. There were words of exclusion, which Lord Kenyon did not consider sufficient.

Under these circumstances I am under the necessity of reversing that part of my decree, whereby I declared it to be devisable among the next of kin in exclusion of the widow. Declare, that so much of the residue of the testator's personal estate as was vested in real securities is divisible according to the Statute of Distribution; viz. one half to the widow, the other to the next of kin (1).

SEE, *ante*, the notes to S. C. 2 V. 272.

SELBY v. ALSTON.

[* 339]

MASTER of the ROLLS for the LORD CHANCELLOR.

[1797, MARCH 20, 22.]

WHERE the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges: (a) therefore where the former descends *ex parte paterna*, the latter *ex parte materna*, upon their union the paternal heir has no equity.

No act of the trustee can vary the right of the *cestuy que trust*: but his situation may: as where the *cestuy que trust* is his heir, the right to dower depends upon which dies first, [p. 341.]

JAMES SELBY having contracted for the purchase of certain estates in the counties of Middlesex and Hertford and the isle of Ely, and

the ancient diocese of Litchfield and Coventry, and was incorporated with the Archdeaconry of Richmond, in the diocese of York, to form the newly-erected diocese of Chester, by statute 33 Henry VIII. c. 31. 1 Williams, Exec. 5.

(1) *Post*: Affirmed on appeal to the Lord Chancellor, 492; vol. v. 676; *Druce v. Denison*, vi. 385; *Garthshore v. Chalie*, x. 1; *Leake v. Robinson*, 2 Mer. 363. See *Glover v. Bates*, 1 Atk. 439; *Read v. Snell*, 2 Atk. 642.

(a) See, *ante*, p. 126, note (a) *Nicholson v. Halsey*, 1 Johns. Ch. 422; *Gardner v. Astor*, 3 ib. 53; 1 Maddock, Ch. 457.

having paid the purchase-money, afterwards by his will gave and devised "all the rest of my real and personal estate whatsoever and wheresoever to my said wife in trust, that she do thereout educate and maintain my said son until he shall attain the age of twenty-one years, and until he shall have sufficiently settled and secured to and upon my said wife what is to be settled upon and given to her, as aforesaid; and afterwards in trust to convey and dispose of all the then rest of my real and personal estate and the produce thereof to my said son, his heirs, executors and assigns: but in case my said son shall die without issue, before he shall attain his age of twenty-one years, then in trust," &c.

The testator died before any conveyance was made of the estates agreed to be purchased. After his death a conveyance by lease and release was made to his widow; who died before her son attained the age of twenty-one. He afterwards attained the age; and died in 1772, having been always in possession of these estates from the death of his mother, and having devised them to charitable uses; which devise was void by the Statute of Mortmain (1).

The bill was filed by the heir at law *ex parte paterna* claiming these estates against the heir *ex parte materna*; who was in possession. The Defendant put in a general demurrer.

Solicitor General [Sir John Mitford], for the Plaintiff. The question is, as to the equity of the Plaintiff. The ground of his coming here is, that the legal title is in the Defendant. The son being entitled in both capacities, as heir *ex parte paterna*, and *ex parte materna*, that made it a question of election; and it might not have been the same to him to take in either character; for his mother might have died considerably indebted. If the equitable estate

[* 340] merges in the legal, a *cestuy que * trust* happening to be heir of his trustee must be liable to all the judgments of the trustee.

The Master of the Rolls suggesting, that this point had been before Lord Thurlow, and Mr. Mansfield and Mr. Stratford, who supported the demurrer, saying it had been determined by Lord Thurlow in favor of the heir *ex parte materna* upon this very will in *Hone v. Medcraft* and *Franklin v. Alston*, 23d April, 1779, it was ordered to stand over, that it might be inquired into; the Master of the Rolls saying, if that was so, it would not be proper for him sitting for the Lord Chancellor to give any opinion upon it.

March 22d. MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN.] Upon looking into this case I have no objection to give my opinion; as, if it was decided by Lord Thurlow, my opinion is the same as his.

The ground of this bill is, that the Plaintiff claiming as heir *ex parte paterna* of the late Mr. Selby, has an equity to call for a conveyance. The case and the premises, or at least some of them, are exactly the same as in *Goodright v. Wells*, Doug. 771. When this was mentioned, it occurred to me, that the question had been

already decided by Lord Thurlow in some other cause. After a verdict at law and a judgment determining, that at law it descended to the heir *ex parte materna*, with a very strong opinion of three of the judges, that equitably the heir *ex parte paterna* could have no claim, though one judge gave an opinion to the contrary, it does appear, that the point, whether argued or not, came on before Lord Thurlow. The Register's book contains farther directions in two causes. Both bills were restrained twelve months; and it was ordered that Wells and the Franklyns, claiming as heirs upon the part of his father's mother, should bring an ejectment; that Sir Rowland Alston claiming on the part of the mother should also bring an ejectment; that there should be a trial at bar; and that Sir Rowland Alston might also attend at the trial of the ejectment brought by the Wells's. The ejectment was under the direction of this Court: that is certain. Upon farther directions his Lordship declared, that the devise in the will of the several freehold and leasehold estates thereby given to the charity was void; and it was ordered, that the title-deeds of the estates in St. Clement's Church Yard and at Hertingfordbury should be delivered to Sir Rowland *Alston, [* 341] who recovered in the ejectment; and that the receiver should be discharged.

If any equity remained between these heirs, this decree could not have been made. The equitable point was raised in the Court of Law; and the Judges gave their opinions upon it; and Lord Thurlow delivered up possession to the person claiming as heir *ex parte materna*.

Then the next question is, whether upon the case made by the Plaintiff he is entitled to an equity. The question at law was clear: there could be no question about that: but the Judges intimated their opinions upon the equitable point. The argument of Mr. Justice Wilson was more equitable than legal. We have an intimation of the opinion of Lord Mansfield and a strong opinion of the Judges Ashhurst and Buller against the equity. Mr. Justice Willes's opinion was in favor of the equity. The question now is, whether upon the case now coming before a Court of Equity the opinion of the three Judges is such as this Court will follow. I do not say, the case is free from all difficulty: and there may be good reason to contend, that the situation of the trustee shall not affect in any degree the estate coming from him to his *cestuy que trust*; but I must not lay that down too broadly; for that is not the fact. In *Philips v. Brydges* (*ante*, 126.) I stated as a universal proposition, that wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former (1). I stated, and think, I was warranted in so doing, that no act of the trustee can in any degree vary the right of the *cestuy que trust*: but I did not state, nor upon full consideration am I pre-

(1) *Post*, vol. xviii. 418, *Wykham v. Wykham*. See *ante*, vol. ii. 606, the conclusion of the note to *Williams v. Owens*.

pared to say, that it was ever held, that the situation of the trustee and the operation of law arising from that situation and the relation to the *cestuy que trust* does not make considerable difference in the estates to be taken : as for instance : supposing the trustee was an ancestor of the *cestuy que trust*, and dies : and then the *cestuy que trust* dies : is there any doubt, that his widow would be dowable : though if the *cestuy que trust* died first, she unquestionably would not. It has been argued, that the trustee is a mere instrument, and his situation or act can have no effect at all upon the estate. I have put a case, where the fact being, that the legal estate descends upon the *cestuy que trust* and is united with the trust estate, [*342] * he becomes solely seised at law ; and both his widow and heir are entitled. Therefore the situation of the trustee (I do not say, his act) may make a considerable difference. If the widow of Mr. Selby had conveyed to the son, it is clear, he would have taken an estate descendible to his heirs *ex parte paterna*. Suppose she had made a feoffment to the use of herself for life ; remainder to her son : she would have had no intention of giving the estate in any new line : (it is to be supposed, she would rather it should continue in the line, that would carry it to her own heirs), but that act, though not done with that view, would have such an effect. So, where an heir takes by devise instead of by descent, the consequences are different : but that was never insisted on as a ground of equity. If an heir *ex parte materna* takes by devise, that would let in his heirs *ex parte paterna*, and if they fail, his heirs *ex parte materna* also : if he takes by descent, he would only take an estate descendible to his heirs *ex parte materna* (1) ; and yet, if he can take by descent, the law makes him take so. The case of an escheat does seem a hardship upon the line of heirs, that would have succeeded, if Mr. Selby had taken from his father. That is the only argument, that pressed upon my mind. Where the person himself has an equal, co-extensive, estate at law and in equity, the legal shall prevail notwithstanding the case I put of the escheat. I have not found, that Courts of Equity have ever upon that circumstance held, that he is not to be considered as having a co-extensive estate in law and equity.

The case relied upon in *Philips v. Brydges* was *Wade v. Paget*, 1 Bro. C. C. 363. There Lord Thurlow lays down a universal proposition, to which I am inclined to accede ; that where the estates unite, the equitable must merge in the legal. That was the principle of the opinion of the Judges in *Goodright v. Wells* ; and upon consideration I am inclined not to lay any restriction upon or to narrow it in any respect, but to hold, that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either come together or are afterwards united in him, the legal will prevail, the equitable is totally gone for the pur-

(1) *Langley v. Sneyd*, 1 Sim. & Stu. 45.

pose of being acted upon by any person in this Court. Therefore that being to be laid down universally, this demurrer must be allowed against the Plaintiff claiming as heir *ex parte paterna*.

1. In order to operate a *merger* of an equitable into a legal estate, the equitable and the legal estate must be of commensurate extent. *Merest v. James*, 6 Mad. 119. When a person, having a term for years in lands, succeeds to or purchases the inheritance of the same lands, the term does not merge in the inheritance when the owner has in one the equitable interest, and the legal estate in the other; but the inheritance draws to itself the term, and makes that *attendant* upon it. *Capel v. Girdler*, 9 Ves. 510. And whenever a term would merge in the inheritance, if united in the same person, it will, without any express declaration, be attendant on the inheritance, by implication of law, although it may have been taken in the name of a different person, in trust for the owner of the inheritance; *Scott v. Fenhoulllet*, 1 Brown, 70; or, *vice versa*, although a purchaser may have taken a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name; unless, in either case, there has been an express declaration of a contrary intent. *Douise v. Percival*, 1 Vern. 104; *Tiffin v. Tiffin*, 2 Freem. 66; *Best v. Stamford*, 2 Freem. 289; *Whitchurch v. Whitchurch*, Gilb. Eq. Rep. 171.

2. That no dilatory or capricious act of a trustee, will be allowed either to benefit himself, or to affect others; see, *ante*, note 6, to *Hutcheon v. Mannington*, 1 V. 366; but the *dictum*, in the principal case, that no act of a trustee can, in any degree, vary the right of his *cestui que trust*, must be received *sub-modo*: no doubt, so long as the relation continues unbroken by any act, adverse or otherwise, so long there is no necessity for any interposition on the part of the *cestui que trust*, whose interest the trustee is bound to protect; and the length of time during which he has neglected to discharge his trust, can form no bar to his responsibility. *Chalmer v. Bradley*, 1 Jac. & Walk. 67. But when a trustee has refused to render any account of the proceeds of the trust estate, and has also denied the title of the *cestui que trust*; from the period of such denial, his possession must necessarily be looked upon as adverse; the Statute of Limitations will begin to run, and if relief is not sought within the time thereby prescribed, the equitable estate will be as conclusively barred as a legal estate, under similar circumstances of *laches*, would be. *Fisher v. Prosser*, Cowp. 218. For, although, to constitute a disseisin, a wrongful entry may in legal strictness be required, still, where the negligent owner has forfeited his right to recover, the estate will remain with the actual possessor; though he may have been, originally, a trustee. *Doe v. Perkins*, 3 Mau. & Sel. 275; *Taylor v. Horde*, 1 Burr. 119. But notwithstanding length of time may bar the justest claims, where there has been possession under an adverse title, and the mere fact that there has been, all the time, an outstanding estate vested in a naked trustee, will not vary the case; for that would be, in effect, to determine that no equitable estate could ever be barred by length of time; (*Cholmondeley v. Clinton*, 2 Jac. & Walk. 146, 175; *Harmood v. Oglander*, 6 Ves. 217;) yet, certainly, when the possession has been — not, constructively, in a mere naked trustee, but — actually in one who entered under and by virtue of the trust, and who has not expressly disavowed the relation, his possession will not be considered as adverse to the real title, but will be referred thereto; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 170; for wrongful possession will never be imputed where it is capable of being referred to a just title. *Conroy v. Caulfield*, 2 Ball & Bea. 272; *Gregory v. Mighell*, 18 Ves. 333; *Kennedy v. Daly*, 1 Sch. & Lef. 381. And see, *post*, the note to *Wills v. Stradling*, 3 V. 378.

RYVES v. RYVES.

MASTER of the ROLLS for the LORD CHANCELLOR.

[1797, MARCH 20, 22.]

BILL stating generally, that under some deeds in the custody of the Defendants Plaintiff was entitled to some interest in some estates in their possession, prayed a discovery and delivery of the title-deeds, possession of the estates and an account: demurrer to the whole bill allowed. (a)

THE bill stated the following case.

The Plaintiff is the eldest son and heir at law and heir of the body of Thomas Ryves the elder, deceased, by Elizabeth, his first wife, deceased, and also only son and heir at law and customary heir of the said Elizabeth Ryves, who and her sister were the only two children and coheirresses at law of Sir William Abdy, deceased. At the time of the marriage of the Plaintiff's father and mother his mother was seised and possessed of or entitled to divers freehold, copyhold and leasehold estates, as one of the coheirresses of her father, or under his marriage settlement or his will or codicil or by some such or other means; and upon the marriage of the Plaintiff's father and mother or before or at some time after the said marriage some settlement or settlements was or were executed: whereby all or some parts of the aforesaid estates of the said Elizabeth Ryves, and divers other estates, property and effects, belonging as well to the said Thomas Ryves the elder as the said Elizabeth Ryves or one of them, were conveyed upon certain trusts and purposes in such manner, as that estates for life were given to the said Thomas and Elizabeth Ryves or one of them, or at least an estate for life to the said Thomas Ryves the elder with a provision by way of jointure or otherwise for the said Elizabeth Ryves (but who died in the lifetime of the said Thomas) remainder to the first son of the body of the said Thomas by the said Elizabeth or to their first and other sons severally and successively in tail, or in some manner, so as that Plaintiff upon the deaths of his father and mother or the death of

(a) In order to comprehend the conclusion of the Master of the Rolls, in this case, it will be important to observe the vague and alternative statements of the bill. It appears that it was bad for vagueness and uncertainty, and was to be treated as a mere fishing bill. See Story, Eq. Pl. § 245, 320. So, where a bill was founded upon the supposed due execution of a power, and insisted in the alternative, that it was a good execution of the power at law, and if not, that it was a good execution of the power in equity; the bill was held bad on demurrer; for the plaintiffs ought to state distinctly, whether their case is at law, or in equity; for if it be good at law, there may be no remedy in equity. Ibid, § 246; *Edwards v. Edwards*, Jac. 335. And further, in the present case, although the plaintiff might be entitled to the discovery of the title-deeds, yet it would seem that he would not have any title to the relief; that, after the discovery being properly at law; and, by praying relief, as well as discovery, his whole bill was demurrable. Ibid, § 476. See *Russell v. Clarke*, 7 Cranch, 69, 89. *Ante*, note (a) to *Renison v. Ashley*, 2 V. 450. This was in the nature of an Ejectment Bill. See, *ante*, p. 4, note (a) to *Loker v. Rolle*.

the said Thomas Ryves the elder became seized of or entitled to all or most of the estates, hereditaments and property, comprised in such settlement or settlements, either in fee or absolutely or as tenant for life or in tail in possession or in some other manner; as in and by the said settlements or settlement or some counterparts, duplicates, copies, drafts, abstracts or extracts, counterpart, duplicate, &c. now in the custody or power of the Defendants or one of them will appear. Elizabeth Ryves was at the time of her death seized of divers other freehold and copyhold estates

*besides those comprised in the said settlement. Upon [*344] her death several years ago Thomas Ryves the elder claiming under the said settlement as tenant by the courtesy or without title entered and enjoyed the premises till his death. He married Anna Maria Ryves; by whom he had issue George Frederick Ryves, now in the West Indies, and Henry Pleydle Ryves. Thomas Ryves the elder died in July 1788: upon which the Plaintiff became entitled to all the aforesaid estates and property comprised in such settlement or settlements, as aforesaid, and the other freehold and copyhold estates, his mother died seized of. Anna Maria Ryves and Henry Pleydle Ryves or one of them took possession of all and singular the estates, lands and hereditaments, property and effects, hereinbefore alluded to, and of all the title deeds, evidences, muniments and writings, belonging thereto, and particularly of the aforesaid settlements or settlement, or some counterparts, duplicates, &c. counterpart, duplicate, &c., and have or hath been ever since in possession or receipt of the rents and profits without having accounted for or paid any part to the Plaintiff.

The Defendants pretend, that they never have possessed any of the estates or property comprised in any such settlements, or which Plaintiff's mother was entitled to at her death, and not comprised in any such settlements, as aforesaid, nor ever have possessed any such settlements or settlement, as aforesaid, or any duplicates, copies, &c. duplicate, copy, &c. of or from such or any other deeds, evidences or writings, deed, evidence or writing, relating to said estates. The Plaintiff charges the contrary; and particularly, that the Defendants or one of them have possessed all or most of the estates comprised in the marriage settlements or settlement or some settlements or settlement made before, upon or after, the marriage of Plaintiff's father or mother, and divers other freehold or copyhold estates, which belonged to his mother at her decease or some time before or after her marriage, or which had belonged to the said Sir Thomas Abdy, and to which Plaintiff became entitled, as aforesaid, or at least some estates or estate comprised in such settlement or settlements, as aforesaid, or which did belong to Plaintiff's said mother or his said maternal grandfather, as well as divers title-deeds, evidences and writings, relating thereto, and especially a certain estate in the county of Lincoln, called the Barnardiston estate or by some other name. The Defendants at other times pretend, that the Plaintiff made an exchange with Thomas Ryves the elder, of some of the estates com-

prised in the said settlements or settlement or which his mother died seised of, as aforesaid, for some other estates; and in particular that Plaintiff made or concurred in the exchange of some estate in Lincolnshire comprised in such settlements or settlement for some estate, which belonged to the said Thomas Ryves the elder in the county of Dorset; which was afterwards sold, and part of the money was received by the Plaintiff. The Plaintiff charges, that he never made any such exchange; and if he ever did, he was prevailed upon by misrepresentation or concealment of the value of the estate; which Plaintiff charges were extremely disproportionate; for Plaintiff charges, that the said estate in Lincolnshire was or is of the annual value of 1100*l.* or upwards, and was actually let at a rent of 1000*l.*; and that the estate in Dorsetshire, for which the same is alleged to have been exchanged, was not nor is of larger value than 400*l.* or 500*l.* a-year. The Plaintiff charges, that he never was in possession of the said estate in Lincolnshire; and if he agreed to such exchange, he was unacquainted with the respective values of such estates; and that the estate in Dorsetshire has not been sold, or at least Plaintiff did not concur in the sale or receive any part of the purchase-money; or in case he did, such circumstances ought not to prejudice the Plaintiff so far as to establish the said pretended exchange, having been effected by fraud. The Defendants pretend, that fines have been levied, or recoveries suffered. The Plaintiff charges, that no such fine or recovery has been levied or suffered; or if they were, by some deed they were declared to enure so that the Plaintiff upon the decease of his father or some other event became entitled. The Defendants pretend, that the Plaintiff released or conveyed to his father for valuable consideration some of the said estates or property; and that Elizabeth Ryves had power to make a will, and devised to her husband. The Plaintiff charges the contrary; and that such will, if any such there be, has been considered invalid and therefore was never proved, but is in the custody of the Defendants; who ought to produce it as evidence, that no good exchange has ever been made of the said Barnardiston estate or the said estate in Lincolnshire. The Plaintiff charges, that applications were made by the Defendant Henry Pleydle Ryves and offers of money to the Plaintiff, if he would execute deeds, in order to effectuate a sale of the estate last alluded to or some part thereof, or some other estate; and then admitted, that the Barnardiston estate was comprised in the marriage settlement of Plaintiff's father and mother; [*346] that they *ought to set forth, why it was for the Plaintiff to join in such deeds; that sometimes they set up and claim other rights, and allege, that there are or is some terms or term upon or affecting the said estates or some parts thereof now outstanding; and that in case the Plaintiff shall commence any action to obtain possession, they will set up such terms or term, and thereby nonsuit or defeat him; so that he is unable to proceed with safety at law to obtain possession.

The prayer of the bill was, that the Defendants Anna Maria Ryves and Henry Pleydle Ryves may be compelled to produce all such settlements, deeds, indentures, wills, instruments and writings, or such settlement, deed, &c., as they or either of them may have in their, his or her, custody or power, by virtue whereof the Plaintiff is entitled to all of the estates and hereditaments late in the possession of his father, which are now in the possession of the said Defendants or either of them or any person claiming under them; or which may in any manner tend to prove or show the title of the Plaintiff thereto; so that the Plaintiff may have an opportunity of procuring the same to be inspected on his behalf; and that the Defendants may deliver or procure to be delivered up to the Plaintiff the possession of the estates now in the possession of them or either of them, which the Plaintiff shall be found entitled to, together with all title-deeds and writings in the custody or power of the said defendants or any persons claiming under them in anywise relating or belonging thereto; and for an account of the rents and profits and for farther relief. The usual affidavit was annexed to the bill.

The Defendants demur to the said bill; and for cause of demurrer show, that the Plaintiff hath not by his said bill shown any sufficient matter of equity to entitle him to the relief thereby sought; wherefore and for other causes appearing upon the said bill the Defendants demur thereto, &c.

In support of the demurrer it was argued, that this is one of those vexatious fishing bills, which have always received the disapprobation of the Court. It is so vague and uncertain, that the Defendants cannot plead to it: and must discover all deeds relating to all their estates. Applicable to every thing, it applies in certain to nothing. The bill ought to state, what the property is, to which it applies; *and from what is said of the exchange it appears, the Plaintiff could do so. There must be what Lord Hardwicke calls convenient certainty. The Plaintiff is clearly not entitled to the relief he prays; and in that case a demurrer lies to the whole bill according to the rule adopted by Lord Thurlow upon great consideration; which is one of the wisest rules ever established. It is very important to a Defendant, whether the bill is framed in the shape, in which the Plaintiff is entitled, or not, in respect of the Defendant's right to know, what he is or is not to answer. A bill of discovery must state some purpose; to which the discovery sought must be applicable.

In support of the bill it was said, that relief might be given, if the answer admits possession of such estates and receipt of the rents and profits; and the Plaintiff could not state it with more particularity. The rule cannot apply to a case, where the whole ground of the bill is discovery, and a prayer of relief is added in six lines; by which the Defendant cannot be hurt.

The cases cited were *The East India Company v. Herbert*, before Lord Thurlow; who upon the mere ground, that the bill was framed in a very loose way, allowed the demurrer in effect by giving the

Plaintiffs leave to amend, paying the costs of arguing the demurrer (1): as to the point of practice, *Fry v. Penn*, 2 Bro. C. C. 280. *Renison v. Ashley* (*ante*, Vol. II. 459), and the cases there cited; *Brandon v. Sands*, (*ante*, Vol. II. 514); *Loker v. Rolle* (*ante*, 4). (2).

March 22d. The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN], allowed the demurrer, and gave the Plaintiffs leave to amend (3).

THAT a demurrer good to the relief prayed, is good as to the discovery, also; see, *ante*, the note to *Renison v. Ashley*, 2 V. 459.

[* 348] DUKE OF LEEDS v. MUNDAY. (4)

MASTER of the ROLLS for the LORD CHANCELLOR.

[1797.—SITTINGS AFTER HILARY TERM.]

THE legal estate in mortgaged premises did not pass by a general residuary devise by the mortgagee. (a)

UNDER a reference to the Master to examine and certify, in whom the legal estate of certain mortgaged premises was vested, and whether Georgiana Elizabeth Munday was an infant trustee and mortgagee within the statute 7 Anne, c. 19, and for whom, the Master certified, that by certain indentures the late Duke of Leeds and the present Duke (then Marquis of Carmarthen) mortgaged the estate in question to James Mansfield Chadwicke in fee for securing the repayment of the sum of 25,000*l.* with interest. The mortgagee is since dead, having first duly made his will; whereby he gave and bequeathed the said sum of 25,000*l.* and interest due on the said mortgage to his executors upon certain trusts for the benefit of the infant Georgiana Elizabeth Munday; and he gave, devised and bequeathed, all the rest, residue and remainder, of his estate and

(1) *East India Company v. Henchman*, *ante*, vol. i. 287.

(2) *Crow v. Tyrrell*, 3 Madd. 179. See the note, *ante*, vol. ii. 461.

(3) *Leman v. Aile*, Amb. 163.

(4) Ex relatione.

(a) The conclusion of the Master of the Rolls is not enforced by any exposition of reasons or authorities. Lands held by the testator, as mortgagee or trustee, will pass by the usual general words in a will unless it can be collected from the language of the will, or the purposes and objects of the testator, that the intention was otherwise. 4 Kent, Com. 538, 539 (5th edit.); *Jackson v. Delancy*, 13 Johns. 537; where the diversity of opinion on this subject to be found in the modern Chancery decisions, is satisfactorily accounted for by Mr. Chancellor Kent, it being shown that the old cases exhibit an entire agreement. *Galliers v. Moss*, 9 B. & C. 267. Lands vested in the devisor as mortgagee will pass in a will by the words "debts and securities for money." *Mather v. Thomas*, 10 Bing. 44. But see *Attorney General v. Buller*, 1 Binn. 93.

effects whatsoever and wheresoever and of what nature or kind soever and every part and parcel thereof (subject to the payment of his debts and to the payment of an annuity of 30*l.*) unto and to the use and behoof of his sister Elizabeth Watham, her heirs and assigns for ever. The present Duke of Leeds is absolutely entitled in his own right to the fee simple and equity of redemption of the said mortgaged premises, subject to the said 25,000*l.* The executors of the mortgagee having called for payment, the Duke of Leeds sold the premises for 39,000*l.* to Thomas Evans and William Strutt in equal moieties. The mortgagee left his sister, Elizabeth Watham, and his niece, the infant Georgiana Elizabeth Munday, his coheiresses at law.

The Master farther certified, that he was of opinion, that the legal estate of and in the said premises passed by the residuary devise in the will of James Mansfield Chadwicke to his devisee: but in case it did not so pass, but descended as undisposed of, then he found, that the infant was an infant trustee as to one moiety for the said purchasers within the intent and meaning of the act.

*The purchasers having consulted two conveyancers, [*349] who advised, that the legal estate did not pass by the will of the mortgagee, the petition was presented by the Duke of Leeds, in order to have the opinion of the Court upon the point.

Mr. *Richards*, who with the *Attorney General* [Sir John Scott], was to support the Master's opinion, cited *Ex parte Bowes*, stated by Mr. Sanders in a note to *Casborne v. Scarfe*, 1 Atk. 605. 3d edition.

The *Solicitor General* [Sir John Mitford] and Mr. *Roupel* were to have argued, that the legal estate in the mortgaged premises did not pass by the devise: the former was not present: but Mr. *Roupel* having mentioned Lord Hardwicke's opinion to that effect in *Casborne v. Scarfe*, (a) and the Attorney General admitting, he could not support the devise, the order was made; declaring, that the infant was a trustee and mortgagee within the act; and ordering her to convey, so far as any legal estate in the mortgaged premises descended to her (1).

THE intimation, conveyed in the report of the principal case, that the learned judge, (Lord Alvanley,) had "no doubt" about it, is corrected in the note to 5 Ves. 341. The rule now established is, that by a devise in general terms, a trust or mortgage estate will commonly pass; but that it will not do so where an intent appears to treat the subject of devise in a manner inconsistent with the nature of trust property; or where it can be collected from any expressions in the will, that the testator did not intend to pass trust estate. *Lord Braybrooke v. Inskip*, 8 Ves. 435; *Ex parte Morgan*, 10 Ves. 101; *Wall v. Bright*, 1 Jac. & Walk. 498.

(a) But see *post*, *Braybrooke v. Inskip*, 8 V. 436, where Lord Eldon says, he did not believe Lord Hardwicke said what was attributed to him in that case.

(1) See Mr. Butler's note: Co. Lit. 203, b. note 96. This point after much fluctuation, *post*, *Ex parte Sergison*, vol. iv. 147; *The Attorney General v. Buller*, v. 339; *Ex parte Brettell*, vi. 577; viii. 276, is in *Lord Braybrooke v. Inskip*, viii. 417, thus settled upon consideration of all the cases; that a trust estate will pass by a general devise, unless the contrary intention can be collected from expres-

GEDGE, *Ex parte*.

[1797, MARCH 30.]

CREDITOR by compromising his debt after having struck a docket forfeits the debt.

THE petitioner after having struck a docket compromised his debt by receiving bills of exchange indorsed to him by the debtor; against whom a commission of bankruptcy issued about a week afterwards upon the debt of another creditor. Upon the application of the solicitor for the assignees under that commission the petitioner delivered up the bills, he had received, and applied to prove his debt under the commission: but the commissioners refused to admit the proof on the ground, that he had forfeited his debt under the statute 5 Geo. II. c. 30, § 24; upon which this petition was presented.

Mr. *Richards*, for the petition, said, that this is a penal act; and ought to be construed strictly. The statute speaks of a compromise after a commission issued: in this instance nothing farther was done than striking a docket.

[* 350] *Mr. *Leach*, for the assignees, cited *Ex parte Thompson* (*ante*, Vol. I. 157).

LORD CHANCELLOR [LOUGHBOROUGH]. I am very glad, there is such a case. It is a stronger case than the present: because it appears, it was a mistake: and nothing could have been done upon the docket. All the mischief follows immediately upon striking the docket. By striking a docket they gain to themselves four days to traffic. The petition must be dismissed with costs (1).

SEE the 8th section of the consolidated Bankrupt Act, 6 Geo. IV. c. 16, as to the forfeiture incurred by a creditor who, after having struck a docket against his debtor, compounds with him.

MOORE *v.* BOOTH.

[1797, APRIL 26, 27.]

A PARTY attending an arbitrator under an order of the Court is privileged from arrest. (a)

By a decree made in this cause at the Rolls by consent all matters in dispute were referred to an arbitrator; whose award was to be final, provided the same should be delivered in writing and signed

sions in the will or purposes or objects of the testator. *Ex parte Morgan*, vol. x. 101; *Wall v. Bright*, 1 Jac. & Walk, 494; *Thompson v. Grant*, 4 Madd. 438; *Silvester v. Jarman*, 10 Pri. 78.

(1) This case over-ruled. See the note, *ante*, vol. i. 158.

(a) As to privilege from arrest, see 1 Smith, Practice, 389-391; *Orchard's Case*, 5 Russ. 159.

by him on or before the 28th of November, 1796; and it was ordered, that all parties should attend the arbitrator from time to time, as he should direct; and that all books, papers and writings, in the custody of the Master or any of the parties relating to the matters in question should be produced before the arbitrator, as he should direct; to be ascertained by the oath of the respective parties producing the same, and the parties or any other persons were to be examined upon interrogatories and otherwise, as the arbitrator should direct; and for that purpose were to be sworn before the Master.

The time appointed for making the award was enlarged by order to the 3d of May, 1797.

The Defendant Edward Aylett attended the arbitrator by his appointment on the 22d of April with his box and papers, and finished his examination; when the arbitrator directed him to swear to his examination before the Master at the Public Office in Southampton buildings, and afterwards to return and leave such examination with the arbitrator, with the said box and papers and the key of such box. Aylett went immediately to the Public Office in Southampton Buildings, swore to his examination, and immediately returned to the arbitrator's chambers with a message

* from the Master, that he would keep the papers and examination, till the arbitrator's clerk should call for them. [*351]

Aylett was on his return from the arbitrator's chambers arrested in Lincoln's Inn in an action upon the case in the Court of Common Pleas for 38*l.* and a detainer was lodged against him under an attachment issuing out of this Court for not paying the sum of 102*l.* 17*s.* 3*d.*

The Attorney General [Sir John Scott] and Mr. Alcock moved, that he might be discharged, as within the privilege; the order being compulsory and the cause not being out of Court. They cited *Hetley's Case*, in the Exchequer, 1788. Com. Dig. tit. Privilege (1).

Solicitor General [Sir John Mitford], *contra*, insisted, that the privilege with regard to the party himself was confined to the hearing of the cause, and did not extend to an attendance before the Master (2).

(1) According to the Minute Book of the Court of Exchequer, a rule to show cause was granted in *Hetley's case*: but the event does not appear. The reporter has been informed, that he was discharged by consent; the point being given up, and the attorney submitting to pay the costs.

(2) *Post*, *Bromley v. Holland*, vol. v. 2; *Ex parte Jackson*, xv. 116. The privilege extends to attendance before the Masters: *Ex parte Ledwich*, viii. 598; *Sidgier v. Birch*, ix. 69; *Franklin v. Colquhoun*, 1 Madd. 580: on Commissioners of Bankruptcy: *Post*, *Ex parte Parker*, 554; *Ex parte Hawkins*, iv. 691; vi. 783; *Ex parte King*, *Ex parte Donlevy*, vii. 312, 317; *Ogle's Case*, xi. 556; *Ex parte Jackson*, xv. 116; *Ex parte Russell*, xix. 163; 1 Rose Bank. Cas. 278; *Ex parte Ross*, 1 Rose, 260; *Ex parte Byne*, 1 Ves. & Bea. 316; *List's Case*, 2 Ves. & Bea. 373; *Ex parte Bryant*, 1 Madd. 49; and to a solicitor attending his client's case: *post*, *Ex parte Ledwich*, viii. 598; *Gascoyne's Case*, xiv. 183; *Castle's Case*, xvi. 412. A Bankrupt, arrested under an escape-warrant on his return from surrendering under an order for liberty to surrender after the time prescribed

LORD CHANCELLOR [LOUGHBOROUGH]. With regard to the practice of this Court it must have happened in some instance or other, so as to have created a settled opinion upon it, whether the privilege extends to attendance upon the Master. There is a very considerable inconvenience, if no privilege is allowed; for if the Court makes an order to attend to swear an examination, the only way of enforcing that is by ordering, that if he does not attend, he shall be committed; but the order may as well be for his being committed, if he is certain of being arrested. I am told, it is understood at Serjeants' Inn, that parties attending at the Judge's chambers are always protected.

April 27th. The LORD CHANCELLOR said, he had found in his own notes of practice the very point decided; that the privilege extended to the case of a party attending an arbitrator under an order of the Court.

The *Solicitor General* admitted, that upon looking into it he could not resist the motion (1).

ALL parties attending, *bona fide*, in any court of justice whatever, whether upon a suit concerning themselves, or one in which their testimony is required; and whether compelled by process, or not, are entitled to protection from arrest, both in going to and returning from such attendance. *Bromley v. Holland*, 5 Ves. 2; *Ex parte Jackson*, 15 Ves. 116; *Ex parte King*, 7 Ves. 314; *Sidgier v. Birch*, 9 Ves. 69.

[* 352]

LEGARD v. JOHNSON.

[1797, FEB. 27; MARCH 1, 2; MAY 12.]

THE Spiritual Court has exclusive cognizance of the rights and duties arising from the state of marriage; a Court of Equity therefore has no jurisdiction upon a contract for separation between husband and wife simply; much less, where it will affect a purchaser or creditor: but the jurisdiction holds in special cases; as where a third party covenants to indemnify the husband against the wife's debts; or a fortune accrues to the wife after separation; or the property is the subject of a trust. (a)

By a settlement previous to the marriage of Anthony Hodges and Anna Sophia Aston, dated the 15th of June, 1782, Henry Aston, father of Anna Sophia, charged certain manors and hereditaments

by the statute, was not discharged: *Ex parte Johnson*, *post*, xiii. 36: nor will his surrender within the time protect him from that process. *Anderson v. Hampton*, 1 Barn. & Ald. 308; *Bottrill's Case*, *post*, xiv. 41, n.

(1) *Ricketts v. Gurney*, 7 Pri. 699.

(a) How the Court will decree to a wife a suitable maintenance out of an equitable property belonging to her. See, *ante*, note (d) to *Ball v. Montgomery*, 2 V. 191. It has often been questioned, whether deeds of separation between husband and wife, through the intervention of trustees, ought not to be held utterly void. 2 Story, Eq. Jur. § 1427; *Westmeath v. Salisbury*, 5 Bligh, N. S. 356; S. C. 1 Dav. & Cl. 519; and the exquisite judgment of Lord Stowell in *Evans v. Evans*, 1 Hagg. Consist. 36; *People v. Mercein*, 8 Paige, 47. But the authorities have gone too far to enable Courts of Equity to adopt this principle. *Ibid*, *Jones v. Waite*, 5 Bing. N. C. 341. The distinctions which have been established on the

with the sum of 4000*l.* for her marriage portion ; and directed that sum to be raised immediately after the marriage, and paid to Sir John Legard and Henry Hervey Aston for the purposes after mentioned : and in consideration of the marriage and the said portion Anthony Hodges covenanted, that he would after the end of three years from the solemnization of the said marriage set apart and appropriate as a fund towards raising the sum of 10,000*l.* one third part of the clear yearly or other rents, issues, profits and proceeds, arising from the several estates and plantations, to which the said Anthony Hodges was entitled within the counties of Oxford and Berks, and in the several islands of St. Christopher's and Montserrat, and would yearly pay the same to Sir John Legard and Henry Hervey Aston or the survivor, his executors, &c. until the said sum of 10,000*l.* should be paid ; and if Anthony Hodges should die, before the said 10,000*l.* should be paid, leaving the said Anna Sophia or any daughter or daughters, younger son or sons, of the said marriage then living, then the heirs, executors, or administrators of Anthony Hodges should within two years after his death pay to Sir John Legard and Henry Hervey Aston or the survivor, &c. the said sum of 10,000*l.* or so much as should remain unpaid, with interest at 5 per cent. from the day of his death, upon the trusts after mentioned ; and it was declared, that the trustees should stand possessed of and interested in the said several sums of 4000*l.* and 10,000*l.* or such part thereof as should from time to time be paid into their hands, upon trust to invest the said sums in real or Government securities, and to pay and apply the yearly interest, dividends and proceeds thereof to Anthony Hodges and his assigns for his life ; and after his decease, upon trust among other things to pay to Anna Sophia Hodges and her assigns for her life an annuity of 500*l.* as a jointure and in lieu of dower ; and subject thereto in trust for the daughters and younger sons of the marriage, as therein mentioned ; and in default of such issue in trust for Anthony Hodges, his executors, administrators, and assigns.

By indentures, dated the 7th of April, 1784, Anthony Hodges *demised, bargained, sold and assured, to Godschall [* 353] Johnson and William Turner, their executors, administrators and assigns, all and every the freehold and copyhold messuages or dwelling-houses, lands, tenements and hereditaments, of Anthony Hodges situate at Bolney and other places in the counties of Oxford and Berks, and also all and every his plantations, dwelling-houses, boiling-houses, &c. buildings, lands, tenements and hereditaments, with the appurtenances in the islands of St. Christopher's and Montserrat, and also all and every the negroes, horses, mares,

subject are clearly stated in 2 Story, Eq. Jur. § 1428. A deed of separation, without the intervention of trustees, is utterly void. Ibid. And a deed for immediate separation, with the intervention of trustees, will not be enforced so far, as it regards any covenant for separation ; but only so far as maintenance is covenanted by the husband, and the trustees covenant to exonerate him from any debts contracted therefor. Ibid. See also *Hindley v. Westmeath*, 6 B. & C. 200.

mules and other cattle and quick stock, as also the mills, stills, coppers, plantation utensils and other dead stock, upon trust, that they or the survivor, his executors, &c. should demise, set or let, and receive the rents, issues and profits, of all and every the freehold and copyhold messuages, lands tenements, hereditaments and premises, in the counties of Oxford and Berks, and should cause the said several plantations and appurtenances and other stock and effects within the said islands to be managed, used and employed, so that the best and greatest rents and yearly returns and proceeds might be made from the said several estates and effects and premises; and upon the trust, that they should pay the rents, issues, profits, proceeds and produce, arising or which should be received or made from the said several estates and plantations or for or in respect of the crops thereof for the year 1783 to Anthony Hodges, or such person or persons as he should appoint; and afterwards should stand possessed of and interested in all and every other the rents, issues, profits, proceeds and produce, of the said several estates, effects and premises, and pay, apply and dispose, thereof, as therein mentioned; and in the first place to deduct, pay and retain, all such costs, charges, expenses, commission and fees, as the said trustees or the survivor, his executors or administrators, should pay, expend or be put to, or which they should reasonably deserve for their commission, fees, journeys or other trouble, in, about or by reason of, the execution of any of the trusts herein contained in their several characters or capacities of the merchant, attorney or solicitor; and in the next place to pay to Anthony Hodges or such person or persons as he should appoint one clear annuity of 1000*l.* for the maintenance and support of himself and his family by four quarterly payments.

By indentures, dated the 8th of August, 1785, reciting, that differences having arisen between Anthony Hodges and Anna Sophia Hodges, they agreed to live separate; and that Anthony Hodges had covenanted to pay and secure to be paid into the hands of Henry Hervey Aston the yearly sum of 500*l.* for three years, and after the expiration of that time the yearly sum of 600*l.* during the joint lives of Anthony Hodges and Anna Sophia Hodges, for the maintenance and support of Anna Sophia Hodges, and that in consideration thereof Henry Hervey Aston had agreed to indemnify Anthony Hodges from any debts or engagements contracted by Anna Sophia Hodges before her marriage, or which she should thereafter contract, it was declared and agreed, and Anthony Hodges covenanted, that Anna Sophia Hodges should from thenceforth live separate and apart from him, as if she were sole and unmarried; and that he would yearly for the term of three years pay or cause to be paid to Henry Hervey Aston, his executors, &c. 500*l.*, and after the expiration of the said term during the joint lives of Anthony and Anna Sophia Hodges the yearly sum of 600*l.*, in trust for the separate use of Anna Sophia Hodges for her maintenance, payable quarterly; and for better securing the said yearly payments Anthony Hodges did bargain, sell, assign, direct and appoint, to Henry Her-

vey Aston, his executors, &c. all and every the dividends, interest and produce, of the sum of 4000*l.* therein mentioned to be the portion of Anna Sophia Hodges, and of which the dividends, interest and produce, was limited in trust to Anthony Hodges for life; and also so much of the yearly sum of 1000*l.* which by the indenture of the 7th of April, 1784, was limited to be paid to Anthony Hodges for the maintenance and support of himself and his family, as should from time to time be sufficient with the dividends, interest and proceeds of the said sum of 4000*l.* to pay to Henry Hervey Aston the said yearly sums of 500*l.* and 600*l.* as they should severally become due; to hold and receive the same to Henry Hervey Aston in trust for the separate use and for the maintenance and support of Anna Sophia Hodges.

This deed was not executed by Henry Hervey Aston. Johnson and Turner were made parties: but they never executed. The allowance was paid under it to the 25th of March, 1790; and several of the payments were made by Johnson. After the execution of the deed Mr. and Mrs. Hodges lived separate; and they were afterwards separated by sentence of the Spiritual Court. Henry Hervey Aston, the son and heir at law of Henry Aston, after the death of his father raised the sum of 4000*l.*; which was laid out in 545*l.* 8*s.* 10*d.* 3 per cent. Consolidated Bank Annuities in the * names of the trustees; and by a deed-poll indorsed [* 355] upon the settlement they at the request of Anthony Hodges declared, that they would stand possessed thereof upon the trusts of the settlement. Since the 22d of July, 1793, the trustees paid those dividends to Mrs. Hodges.

By indentures, dated the 20th of November, 1786, Anthony Hodges in consideration of 3300*l.* then remaining due from him to Godschall Johnson, and for securing the re-payment thereof and of all and every sum or sums of money, which Johnson should at any time advance to Hodges, or in which Hodges should at any time be indebted to him upon any account whatsoever, with interest, did bargain, sell, and assign, to Johnson, his executors, &c. all his right, title, interest, property, &c. at law or in equity to the sum of 4000*l.*, the marriage portion of Anna Sophia Hodges, and all the interest, dividends, and proceeds, from time to time to arise in respect thereof, and also of and in the manors, lands, and hereditaments, charged with the said sum, to hold to Johnson, his executors, &c. subject to redemption on payment of the said 3300*l.* with interest on the 20th of November, 1787, and of all other sums, in which Hodges should become indebted to Johnson, within three months after advancing such sums; with a covenant for assigning all right, title, and interest, of Hodges to the sum of 10,000*l.* by the aforesaid settlement agreed to be raised and settled upon the trusts and for the purposes in the said settlement declared, and the interest, dividends, and proceeds thereof, subject to the like condition of redemption; and that until such assignment the trustees in the said settlement should stand possessed of the said 10,000*l.* as to the right and

interest of Anthony Hodges in trust for Johnson, his executors, &c. subject to the said condition of redemption.

By the decree made upon the 14th of May 1792, upon a bill filed by the trustees in the marriage settlement of Anthony Hodges against him, Johnson and Turner, it was declared, that Johnson and Turner were to be considered as trustees of one third part of the clear annual profits of the trust-estates in question; and it was referred to the Master to take an account of the rents and profits of the said trusts from the 16th of January, 1785, received by or on behalf of Johnson and Turner, and of their payments made thereout.

By an order made on the re-hearing of that cause on the [* 356] 6th of * August, 1793, it was ordered, that the said decree should be varied; and instead of the declaration, that Johnson and Turner were to be considered as trustees of one third part, &c. it was declared, that the Defendant Anthony Hodges ought specifically to perform the covenant in the said indenture of settlement: and that Johnson and Turner ought under the terms of the said indenture of demise of the 7th of April, 1784, to account with the Plaintiffs Sir John Legard and Henry Hervey Aston for one third part of the clear annual profits of the estates and plantations in question, so long as they should continue to be in the management and in receipt of the same; and in taking the said account thereof and of the payments made thereout, as directed by the decree, it was ordered, that the Master should inquire, what payments had been made thereout in respect of the said principal or interest of any and what mortgages or liens, and by whom made, affecting the said estates or any part thereof upon the 15th of June, 1782, or at any time afterwards, and should state all material circumstances relating thereto; and the Court reserved the consideration, whether the payments made in respect of the principal or interest of such mortgages or liens or any of them were to be allowed to Johnson and Turner or either of them in the accounts directed as against the said Plaintiffs Sir John Legard and Henry Hervey Aston claiming under the said settlement, and whether the said mortgages and liens or any of them were to have any and what preference to such indenture of settlement; and it was ordered, that the Master should consider, whether any and what allowance ought to be made to Johnson and Turner for their commission, fees, journeys, and other trouble, pursuant to the said deed of the 7th of April, 1784; and that with the said variations and additions the decree should be affirmed (1).

By indentures, dated the 4th of February, 1793, in consideration of the premises and of 12,998*l.* 11*s.* 6*d.* therein mentioned to be then due from Anthony Hodges to Godschall Johnson and for securing the re-payment, Hodges granted, bargained, sold, and demised, and William Turner at his request, so far as he lawfully might by the estate and interest vested in him under the indenture

(1) *Legard v. Hodges*, *ante*, vol. i. 477; 3 Bro. C. C. 531; 4 Bro. C. C. 421.

of the 7th of April, 1784, bargained, sold, demised and released, to Johnson, his executors, &c., certain estates and premises therein particularly * mentioned, being the trust estates [* 357] comprised in the said indenture of the 7th of April, 1784, to hold to Johnson, his executors, &c. for ninety-nine years, if Anthony Hodges should so long live, discharged from the trusts of the indenture of the 7th of April, 1784, subject to redemption upon payment by Hodges, his executors, &c. to Johnson, his executors, &c. of 4352*l.* 18*s.* principal and interest, due upon a mortgage made to Thomas Lyon, and paid to his assignee Walter Kerfoot by Johnson, part of his said debt of 12,998*l.* 11*s.* 6*d.* with 6 per cent. interest, (being the lawful rate of interest of the islands of St. Christopher and Montserrat) and the sum of 8645*l.* 13*s.* 6*d.* the remainder of the said debt, with 5 per cent. interest, upon the 4th of August next, and all other such sums as Johnson, his heirs, executors, &c. should pay by the order of the Court of Chancery or otherwise in respect of the said 10,000*l.* covenanted by Anthony Hodges in his marriage settlement to be paid to the trustees, or the costs of the suit already brought, or any other touching the same, and also all other such sums as Johnson, his executors, &c. should afterwards advance or pay for Hodges; and Johnson covenanted to pay on account of Hodges the yearly sum of 500*l.* in lieu of all other provision by the said deed of the 7th of April, 1784, and articles of agreement of the 24th of March, 1791. He also covenanted to pay all such sums of money as Anthony Hodges should be compelled to pay to Anna Sophia Hodges in respect of her annuity under the deed of separation.

The bill was filed by the trustees under the marriage settlement of Mr. and Mrs. Hodges and by Mrs. Hodges against Johnson, Turner, and Mr. Hodges; praying an account of the money due to Anna Sophia Hodges, or Henry Hervey Aston as her trustee, on account of the said annuity of 600*l.*; and that the Plaintiffs or the Plaintiff Henry Hervey Aston may be at liberty to pay to the Plaintiff Anna Sophia Hodges the future dividends to arise upon the said sum of 5451*l.* 8*s.* 10*d.* Bank Annuities towards the said annuity of 600*l.* and may be indemnified by the decree in so doing; and that the Defendants Johnson and Turner may be decreed to pay to the Plaintiff Anna Sophia Hodges, or Henry Hervey Aston as her trustee, so much of the said annuity of 1000*l.* to which the Defendant Anthony Hodges is entitled, as aforesaid, as will be sufficient with the said dividends to make good the annuity of 600*l.*; and that they may be restrained from paying any part of the said annuity of 1000*l.* or any other annuity to the Defendant Hodges, until * the said annuity of 600*l.* is fully paid; and that [* 358] Hodges may be restrained from proceeding against the said trustees for payment of the said annuity of 1000*l.* until the Plaintiff's annuity is satisfied; and that the deed of separation may be delivered up to the Plaintiffs.

The bill charged, that the Plaintiff Henry Hervey Aston was

willing, and had repeatedly applied, and now offers, to execute the deed of separation.

May 12th. Lord CHANCELLOR [LOUGHBOROUGH]. One part of the prayer, namely, that the trustees may be at liberty to pay to Mrs. Hodges the future dividends upon the 5451*l.* 8*s.* 10*d.* Bank Annuities towards her annuity, and may be indemnified by the decree in so doing, is wholly unnecessary. The trustees have been applying the dividends, and are at liberty to go on applying the dividends, as they have already. This part of the bill therefore is only a feint. They are safe in acting upon the dividends, as they have done, till some person sets up a claim. The rest of the prayer brings into discussion, 1*st.* whether the annuity created by the deed as a separate maintenance can under all the circumstances be established by a Court of Equity as a charge specifically affecting the property of Mr. Hodges, stated to be in the possession of the Defendant Johnson: 2*dly*, whether Johnson stands in a different condition from Mr. Hodges; and has any right in his own person either as a creditor or as a purchaser under the second conveyance to him of 1793; which is a conveyance for valuable consideration: then 3*dly*, whether he is to be taken in any sense as a trustee for Mrs. Hodges.

The first is a general question; whether, taking it in the largest extent, a suit in Equity is competent to give effect by the aid of this Court to a deed of separation between husband and wife. To state the case as a general question fairly, I must suppose articles of separation from discordant tempers, without reproach either on the one side or the other. Can I under such circumstances find a case to entitle the wife to a personal decree against the husband? I cannot state the transaction to be higher in point of law than a personal contract *stante matrimonio* between the husband and wife: but I must go farther; and consider that contract a separation, by which they exclude and exonerate one another, as far as they can, from the rights and duties arising from matrimony. The common [*359] law *will not entertain a suit upon contract by a wife against her husband. Such a contract is incapable at law of producing any action. The Ecclesiastical Court according to the jurisdiction of this country has exclusive cognizance of the rights and duties arising from the state of marriage. Therefore I am completely at a loss to discover an equity to control the common law and admit a suit between husband and wife upon a personal contract, (the case I am now putting,) and supersede the exclusive jurisdiction of the Ecclesiastical Court by entering into the consideration of it. In looking through the cases from the time the Reports commenced to be tolerably accurate, soon after the Restoration, when the jurisdictions were again established, I find, that not an idea of that kind was entertained in that famous case of *Whorewood v. Whorewood* in any account of it (1). Soon after the civil war there

(1) 1 Rep. Ch. 118; 1 Ch. Ca. 250; Rep. Ch. in the time of Lord Nottingham, 153. See 1 Fonb. Tr. Eq. 94, 96.

had been a decree by the Lords Commissioners. There being no Ecclesiastical Court, the jurisdiction some way or other got here. After the Restoration, when the jurisdictions were established again, the decree of the Commissioners was to be reviewed. Lord Clarendon was assisted; and after great discussion it ended in throwing the case back for the decision of the competent jurisdiction. The next case is *Mildmay v. Mildmay*, 1 Vern. 53 (1), soon afterwards: Lord Nottingham would not entertain any jurisdiction upon a contract between husband and wife; and in *Hincks v. Nelthorpe*, 1 Vern. 204, a demurrer was put in to the discovery upon the ground, that it was not a matter properly examinable or relievable in this Court; and the demurrer was allowed and the jurisdiction disaffirmed. In the opinion, Lord Hardwicke gave in *Head v. Head*, 3 Atk. 295, 547, there is the same opinion of the defect of jurisdiction in the general case in this Court; and he observed, that where the Court had interfered, they had very unwillingly acted at all. Those cases to which he alludes, where the Court had acted at all, stand under three heads; where a third party had intervened; and it was not only between the husband and wife. A third party binding himself to indemnify the husband against the debts of his wife, the interest of that party raises a consideration for that party; between whom and the husband there might be a contract, and with regard to whom he might bind that party to himself. That was the case *of *Seeling v. Crawley*, 2 Vern. 386. The cir- [*360] cumstances there were a little favorable. The third party was father to the wife. He bound himself to indemnify the husband. The next case *Augier v. Augier*, Pr. Ch. 496, is governed by the same circumstance: but other circumstances were also interposed; which in point of expedience recommended the case considerably to the attention of the Court. A suit for separation had proceeded in the Ecclesiastical Court for bad usage, &c. That depending, an interposition of friends had taken place. The suit was compromised in the Ecclesiastical Court; and upon the consideration of that compromise, there being also a third party there, the decree directed the husband to pay conditionally; and a full security was given to the husband. Certainly neither of these cases can be quoted as an authority, that this Court upon the general and simple question between husband and wife can entertain a suit upon a contract, in which the wife only claims a separate maintenance against the husband.

The other cases, which I do not state, are, where a fortune accrued to the wife after separation; and an application was made to this Court upon a very plain ground: that some provision should be made for her out of a fortune coming under those circumstances. The principle is plain: if it happens from the situation of the parties, that they cannot enjoy in common that, which should maintain both, it would be very hard that the party, from which it moves,

should lose, and the other should gain, the whole benefit (1). Another case, in which the Court may take into its consideration the rights and duties arising from the relation of marriage, is where the property is only to be sued in this jurisdiction; where a trust is created; and there is no coming at it by the common law. That was the case, in *Sidney v. Sidney*, 3 P. Will. 269, and the other case quoted in the note upon that case; where, as a ground to give effect to articles made upon marriage, this Court considered the estate vested according to the articles; and the husband having used the estate as he ought not to have done, and as he could not have done in point of law, if the articles had been completely executed prior to the marriage.

From the view, that I have taken, I therefore remain of opinion, that the ground, I first stated, that this Court as a Court of Equity cannot enter into the consideration of the rights and duties arising from a relation of great importance in civil life, is an answer to this bill; and upon the general abstract question I have met

[* 361] *with no case except the late case of *Guth v. Guth*, 3 Bro.

C. C. 614, to entitle the Court to hold such a jurisdiction. Before I should decide according to that case, I should wish for a farther account of it; for my opinion inclines against it (2). But it is not necessary to found my decree upon an opinion directly contrary to that case: for the interest of Johnson comes most materially in question; and whether the Court would decree a separation, where the only person to be affected was the husband, I think myself warranted both by express authority and distinct reasoning to say, this Court will never do it as against creditors: *Fitzer v. Fitzer*, *Taylor v. Jones*, 2 Atk. 511, 600. In the latter there had been a settlement after marriage; in which the husband out of a fortune bequeathed to him had made a provision for his wife and children: it was held, that, however honorable, it could not possibly be of any avail against creditors. In the former case there was a separation by deed upon a quarrel between them; and the wife and daughter claimed the effect of it against a creditor: Lord Hardwicke lays down expressly, that it is impossible to give effect to such a deed between husband and wife, where it is to turn against creditors. He considers it void upon general principles and void by the statute of Elizabeth.

Then what is the situation of Johnson under the first deed, to which he and Turner are parties? The nature of that deed was fully discussed in another cause (3); and it appeared to me, and, I take it, also to Lord Thurlow, when the cause was heard before him, that it was nothing more than constituting Turner and Johnson attorneys for Mr. Hodges to apply his property to the payment of his debts, giving him in the mean time 1000*l.* a year. They are no otherwise parties to it or to have a benefit under it than as attorneys.

(1) See *Ball v. Montgomery*, ante, vol. ii. 191, and the note, 199.

(2) That case is also disapproved by Lord Eldon, post, vol. xi. 532, in *Lord St. John v. Lady St. John*.

(3) *Legard v. Hodges*, ante, vol. i. 477; 3 Bro. C. C. 531; 4 Bro. C. C. 421.

While that proceeded, this deed of separation was made. Their names were in it; but neither of them executed the deed. They bound themselves to nothing. Johnson made payments to Mrs. Hodges by the direction of the husband. He had notice of the deed of separation, no doubt. He was acting as attorney of Mr. Hodges; and that was sufficient. If he had paid more than he received, he would have had a demand as a creditor of * Mr. Hodges. What is there to affect him by a trust? [* 362] Mr. Aston was named a party. If he had executed and bound himself, it might be different from a mere contract between the husband and wife: but ten years elapsed; and he never bound himself. His offer now to execute is perfectly absurd. The law has by the sentence of the Spiritual Court given Mr. Hodges a better indemnity, than he could give. His offer therefore is perfectly illusory and of no effect. Johnson's having made payments under the deed of separation is of no effect to bind himself. Those payments were properly made under Mr. Hodge's authority. I should be inclined to think him under the statute of Elizabeth entitled to protection as a purchaser for valuable consideration: but it is not necessary to go so far; it is enough to say, he is a creditor of Mr. Hodges; and then upon general principles and the authority of the cases I must hold, that if it was possible to give effect to this deed as against Mr. Hodges, it is impossible as against creditors.

Therefore the bill with regard to all the points must be dismissed; and with regard to Mr. Johnson it must be with costs (1).

See, *ante*, the notes to *Ball v. Montgomery*, in qualification of some of the general doctrines stated in the notes referred to; 2 Ves. 191. But, it should be observed, that a covenant to indemnify a husband against the debts of his wife, (such covenant being entered into by a trustee on her behalf,) may supply a consideration for an agreement, which will justify a Court of Equity in seeing the whole executed; though the leading object of such agreement may have been to effectuate a separation between the husband and wife. *Worrall v. Jacob*, 3 Meriv. 270; *Hyde v. Price*, 3 Ves. 445, and see note 2 to that case, *post*; *Earl of Westmeath v. The Countess of Westmeath*, Jacob's Rep. 142; *Elsworthy v. Bird*, 2 Sim. & Stu. 381.

(1) *Post*, *Cooke v. Wiggins*, vol. x. 101; *Lord St. John v. Lady St. John*, xi. 526; *Seagrave v. Seagrave*, xiii. 439; *Worrall v. Jacob*, 3 Mer. 256; *Durant v. Tilley*, 7 Pri. 577; *Jee v. Thurlow*, 2 Barn. & Cres. 547; *Ros v. Willoughby*, 10 Pri. 2.

WADLEY v. NORTH.

[ROLLS.—1797, MAY 15, 22.]

LEGACY in trust for testator's mother and sister for life, and after the death of the survivor for all and every the child and children of his sister living at her death share and share alike, each receiving his or her share of the principal at twenty-one; and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one: the payment only is postponed, not the vesting. (a)

Testator in India gives all his estate and effects to A. in England in trust, and directs his property to be remitted to him; and after several legacies he gives A. 800*l.* and requests him as soon as the property is remitted to lay out the same in the funds or other securities which shall appear most advantageous for those, who shall be benefited by it hereafter: the 800*l.* is a beneficial legacy, not in trust, [p. 365.]

THOMAS WESTON by his will dated the 23d of September 1787, and made in the East Indies, after payment of all his debts and funeral expenses, gave, devised and bequeathed, all his estate and effects both real and personal wheresoever and whatsoever, except as after-mentioned, to his friend Mr. Percival North, his executors and administrators, in trust and for the following uses; first, to pay the annual amount, profit and produce, thereof unto his mother Ann Weston and his sister Ann Wadley and the survivor in half yearly or quarterly payments, as may be most desirable (the moiety thereof, which his sister should be entitled unto and receive during the life of his mother, being intended for her own and separate use and benefit) for and during the term of their natural lives; and from and after the death of the said mother and sister the survivor of them in trust to pay and apply the same to and for the use and benefit of all and every the child and children of his aforesaid sister, "which shall or may be living at the time of her death, share and share alike; each receiving his or her respective share of the principal [*365] thereof upon his or her *attaining the age of twenty-one years, and if but one child should be so surviving, then in trust to pay and apply the whole to such surviving child upon his or her attaining the age of twenty-one years as aforesaid."

Then after several specific and pecuniary legacies, "I give and bequeath unto my friend Mr. Percival North the sum of 800*l.* and I request of him as soon as my property shall be remitted to lay out and invest the same in the public funds or other securities which to him shall appear most advantageous for those who shall be benefited by it hereafter."

The testator appointed two executors in India, and requested them

Reeves v. Brymer, iv. 399, 692; *Harrison v. Foreman*, *Holloway v. Holloway*, *Bolger v. Mackell*, v. 207, 399, 509, and the note, 512; *Hanson v. Graham*, vi. 239; *Branstrom v. Wilkinson*, vii. 421; *Lane v. Goudge*, ix. 225; *Errington v. Chapman*, *Sansbury v. Read*, xii. 20, 75; *Hixon v. Oliver*, xiii. 108; *Campbell v. Prescott*, xv. 500; *Leake v. Robinson*, 2 Mer. 363; *Skey v. Barnes*, 3 Mer. 335; *Ford v. Rawlins*, 1 Sim. & Stu. 328.

(a) See, *ante*, p. 363, note (a) to *Batford v. Kebbell*.

to lose no time in collecting and realizing his property and remitting the same to Percival North; which they did accordingly.

The testator died in 1789. Ann Wadley died in April 1790; and Ann Weston died in May 1793. Ann Wadley had four children living at the death of the testator; she had one other son born after the death of the testator; who died at the age of six weeks in the life of Ann Weston and Ann Wadley. Of the other four children, two, namely, Samuel Wadley and John Wadley, died after the death of Ann Wadley and in the life of Ann Weston; Samuel in September, 1791, and John in February, 1792; both under the age of twenty-one. Their father took out administration to them, received their shares from Percival North, and afterwards became a bankrupt. The bill was filed on behalf of the surviving children; and the questions were, 1st, Whether the deceased children Samuel and John took vested interests: 2dly, Whether the Defendant was justified in retaining 800*l.* as a beneficial legacy to himself, or whether it was given to him in trust.

Mr. Lloyd and Mr. Wooddeson, for the Plaintiffs. The meaning is, that the children should survive Ann Weston and Ann Wadley and should also attain the age of twenty-one. That must be the construction of the words "so surviving." It may admit the construction that children living at the death of the survivor were intended.

*The Defendant is a trustee as to the legacy of 800*l.* [*366] for the next of kin: there being no disposition of it.

Mr. Graham and Mr. Alexander, for the Defendant. There are several cases to show, that this interest vested at the death of Ann Wadley in all the children then living, and that the enjoyment only was postponed. There is no gift over in the event of the death of all the children under the age of twenty-one; which clearly shows the intention.

As to the second question, according to plain grammatical construction the direction to lay out and invest in the public funds, &c. refers not to the legacy of 800*l.* but to his property, which he directs to be remitted to the Defendant.

Mr. Lloyd, mentioning *Batsford v. Kebbell*, (*ante*, 363,) upon the first point, the Master of the Rolls wished to have an opportunity of seeing a note of that case. His Honor declared his opinion to be very clear in favor of the Defendant upon the second point.

May, 22*d.* MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The only question now remaining is, whether any vested interest accrued to the children before the age of twenty-one. If the testator had stopped at the words "each receiving his or her respective share of the principal thereof upon his or her attaining the age of twenty-one years," there could be no doubt upon the principles laid down in these cases as well as that adopted in *Batsford v. Kebbell*, that it would be a vested interest; the principal being given, the payment postponed: but it is contended, that the word "surviving" in the next clause must refer not to such child as should survive the

mother, upon which survivorship the legacy was first given, but to such as should survive the mother and also survive the age of twenty-one. Take the words, as they stand : "and if but one child should be so surviving, then in trust to pay and apply the whole to such surviving child." It does not stop there : if it had, there would be more reason to contend, that it meant both surviving the mother and likewise the age of twenty-one : but it says "upon his or her attaining the age of twenty-one years as aforesaid." It was perfectly nugatory to put in those words, if it meant surviving

[*367] *both the mother and the age of twenty-one. Therefore upon the true construction, whether he did or did not mean, that it should apply to both, the only survivorship, that appears to me, to which he could refer, was surviving the mother. In *Batsford v. Kebbell*, the Lord Chancellor states the distinction, which I believe is the case, that in all these questions there has been a gift of the principal legacy and a postponement of the payment ; but in that case there were no words of gift of the principal, but merely of the dividends ; and then the principal to be transferred at a particular age ; and therefore it was not vested till that time. That is not the case in the present instance ; for here the principal is given by express words, and limited to all the children living at the death of the testator's sister ; and I am of opinion, that upon the true construction, coupled with the principles laid down as to vesting, it must be to all the children, and the survivorship is only with reference to the mother. Consider the consequence to the other children, if I am obliged to adopt the contrary construction ; for according to that, if these children die before the age of twenty-one, nothing is given at all ; which adds much strength to the ground, I take. The Court would hardly put upon a will, a construction, that would create an intestacy, if it could be avoided. The construction, I adopt, is farther strengthened by the time pointed out in this will ; which is the time, at which the law would give it. If a farther time is specified, which was the case in *Batsford v. Kebbell*, it may be supposed, the time may constitute one of the grounds, upon which the legacy should vest, but when the time appointed is only that, at which the law would put them in possession, it very much fortifies the argument, that it is not meant as the time, at which it should vest, but only, at which they should take possession (1).

I have already given my opinion as to the legacy of 800*l.* upon which there is no doubt.

SEE, *ante*, note 3 to *Mackell v. Winter*, 3 V. 236 ; and, *post*, the notes to *Booth v. Booth*, 4 Ves. 399 ; that the vesting of a legacy is not necessarily prevented merely because the payment is postponed.

(1) See the note, *ante*, 364.

SHUTTLEWORTH, *Ex parte*

[1797, MAY 13.]

A PERSON giving cash for a bill without the indorsement of the person, from whom he takes it, cannot prove it under his bankruptcy. (*a*)

THE bankrupt had before his bankruptcy procured cash from Newton for a bill of exchange; but did not indorse the bill; because Newton desired him not to put his name upon it; as he thought the bill would have as good credit without it. Newton proved in respect of the bill, and received a dividend under the commission. The petition was, that the proof might be expunged, and the dividend refunded.

Mr. Cooke, for the petition. In *Ex parte Whitter* in the matter of *Jeffery*, 7th of February, 1790, and in other cases since, Lord Thurlow determined, that a person taking a bill in this manner was a purchaser of it, not a discounteur; and therefore could not be admitted to prove. In one of the cases the bankrupt said, there was a private mark upon all bills, which he transferred without indorsement; and when he saw that mark, he considered himself liable to pay, as if he had indorsed: (*b*) but Lord Thurlow thought that within the same rule. In another case a person had entered into an engagement, that he would pay the bill in the same manner as if he had indorsed it: but Lord Thurlow held that engagement collateral.

LORD CHANCELLOR [LOUGHBOROUGH] made the order according to the prayer of the petition; observing, that upon the affidavit there was an express agreement for a purchase of the bill.

WHERE there is a previously subsisting debt, on account of which a bill is taken by the creditor, even without the debtor's indorsement, should the bill turn out to be bad, the demand for the antecedent debt may be resorted to. *Ex parte Smith*, 2 Cox, 212; *Dutton v. Solomonson*, 3 Bos. & Pull. 585. But where no previous debt subsisted between the parties, if A. carries a bill to B. merely to be discounted, and B. does not take A.'s name upon the bill, should it be dishonored, there can be no demand against A.; for, (there being no relation between the parties, except as to that transaction,) the circumstance of omitting to take his name upon the bill is evidence that the discounteur made a purchase of the bill.

(*a*) Where a transfer by mere delivery, without indorsement, is made merely by way of sale of the bill or note, as sometimes occurs; *Fenn v. Harrison*, 3 T. R. 759; or exchange of it for other bills; *Horblower v. Proul*, 2 B. & A. 327; or by way of discount, and not as a security for money lent; or where the assignee expressly agrees to take it in payment; and to run all risks, he has in general no right of action whatever against the assignor, in case the bill turns out to be of no value. But there can be no doubt, that if a man assign a bill for any sufficient consideration, *knowing it to be of no value*, and the assignee be not aware of the fact, the former would in all cases be compellable to repay the money he had received. See *Chitty, Bills*, 271. No person whose name is not on the bill, as a party thereto, is liable thereon; nor can he be deemed to undertake any of the obligations of a drawer or indorser. By not indorsing it, he is generally understood to mean that he will not be responsible upon it. *Story, Bills*, § 109.

(*b*) This would not be equivalent to an indorsement. *Chitty, Bills*, 254.

Ex parte Blackburne, 10 Ves. 206; *Ex parte Roberts*, 2 Cox, 171; *Emly v. Lye*, 15 East, 13. But, no doubt, if a man assign a bill for consideration, knowing it to be of no value, and the assignee is unacquainted with the circumstances which render it mere waste paper, the assignor may be compelled to refund the consideration obtained for it by him. *Fenn v. Harrison*, 3 T. R. 759.

FRANCO v. BOLTON.

[1797, MAY 17.]

AFTER verdict upon a bond against the obligor bill to have it delivered up, charging the consideration to have been an agreement by the Defendant to cohabit with the Plaintiff as his wife, and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery: demurrer allowed.(a) Bond in consideration of future cohabitation void at law, (b) [p. 371.]

THE bill stated the following case: In May, 1793, the Plaintiff Jacob Franco in a public company met with and was introduced to the Defendant Elizabeth Bolton, spinster; and in consequence of such introduction an acquaintance commenced between [* 369] them, in the course of which, and in * few days after it had taken place, the Defendant perceiving, that the Plaintiff had become strongly attached to her person, caused a proposal to be made to the Plaintiff, that if he would secure to her an annuity of 100*l.* for her natural life, she would cohabit and live with him as his wife so long as he should require her so to do; and the Plaintiff not reflecting upon the impropriety and immorality of such proposal, and being strongly urged and importuned to accede thereto, not only by the Defendant, but by a Mrs. Courtney (a person employed by the Defendant on that occasion) was at length induced to consent and agree to grant such annuity; and accordingly and in pursuance of the said consent and agreement and for the consideration aforesaid the Plaintiff on or about the 23d of the said month of May executed a bond of that date in the penal sum of 1000*l.* to pay to the Defendant an annuity of 100*l.* during her natural life. The Plaintiff shortly after he had executed the said bond and delivered it to the Defendant, discovered, that at the time she prevailed upon him to give and execute such bond and for some time previous thereto she had lived in a state of incontinence and adultery with various persons; and the Plaintiff therefore and upon an attentive

(a) No person shall be bound to criminate himself or to furnish evidence for any step in the process. *Story*, Eq. Pl. § 591. And in England it makes no difference, whether the charge will subject the party to punishment by the common law, or only to Ecclesiastical censures. *Ibid.* § 592. But a party may be compelled to make discovery of any act of moral turpitude, which does not amount to a public offence or indictable crime. *Ibid.*; *Hare*, Discovery, 142; *Macaulay v. Shackwell*, 1 Bligh, N. S. 121; *S. C.* 2 Russ. 550, note; *Glynn v. Houston*, 1 Keen, 329.

(b) See 1 *Story*, Eq. Jur. § 296-299; *Curtis v. Greenwood*, 6 Mass. 379; *Coutts v. Greenhow*, 2 Munf. 363.

consideration of the immorality and wickedness of the course of life, which had been so as aforesaid proposed to him, determined not to live or cohabit or have any intercourse with the Defendant; and having come to such determination he applied to her, and requested her to deliver up to him the said bond to be cancelled; with which request the Defendant refused to comply; and she brought an action upon the bond, and obtained a verdict.

The bill charged, that the Plaintiff never received from the Defendant or any other person any value or consideration whatever for the said bond or the grant of the said annuity, and was not indebted to the Defendant in any sum of money on any account whatever at the time of giving or executing the bond or at any other time; that such bond was required by the Defendant, and given and executed by the Plaintiff, in consideration of the Defendant's promising and agreeing with the Plaintiff to cohabit and live with him in such unlawful state, as aforesaid; and it was given and executed previous to any cohabitation or unlawful intercourse having taken place between the Plaintiff and Defendant, and as an inducement to such cohabitation and unlawful intercourse; and the Defendant insisted on having the said bond from *the Plaintiff, before [* 370] she would consent to cohabit and live with him; and the Plaintiff in agreeing to give and in the giving of such bond acted under the influence of an improper affection, and of which affection great and undue advantages were taken by the Defendant; and at the time the said bond was given and executed the Defendant had not nor hath since rendered to or performed for the Plaintiff any services whatever; and the said bond was given for the consideration and under the circumstances aforesaid and not otherwise.

The bill prayed a discovery as to all these matters; and that the Defendant may be decreed to deliver up the bond to be cancelled, and may be restrained from proceeding at law.

The Defendant demurred to the bill; and for demurrer thereunto saith, that the complainant hath not in and by his said bill shown any sufficient matter of equity to entitle him to the relief sought thereby.

Mr. *Mansfield* and Mr. *Steele* were proceeding to support the demurrer: but the Lord CHANCELLOR desired to hear what could be said against it.

Attorney General [Sir *John Scott*] and Mr. *Johnson* for the Plaintiff. There is no doubt, that a bond may be given to a person, who has lived in this way with the obligor, as *præmium pudoris*, if there is no agreement for a continuation of that intercourse. It is a moral act; and this Court will not order it to be delivered up under those circumstances. The principles, upon which the Court acts, are stated in a variety of cases; which all go pointedly upon this distinction; that if there has been this sort of cohabitation, and the man chooses voluntarily to give a bond, without any reference to a continuation of that intercourse, it is undoubtedly good: more so, if he was the author of her ruin: but if, as this bill states, she has been a

person living in adultery with others, and she proposes to go and live with A. upon consideration of such a bond, the cases are all uniform, that this Court will order it to be delivered up: *Marchioness of Annandale v. Harris*, 1 Eq. Ca. Ab. 87. *Clarke v. Periam*, 2 Atk. 333. *Robinson v. Gee*, 1 Ves. 254. *Priest v. Parrot*, 2 Ves. 160. *Walker v. Perkins*, 3 Burr. 1568. *Hill v. Spencer*, Amb.

641. The Court proceeds upon grounds of public policy.

[* 371] * There has been a verdict at law; and it may be objected, that this could have been pleaded, and there could have been no such verdict: but the jurisdiction of this Court is to have the bond delivered up. In fact, though it does not appear upon the bill, this was pleaded to the action: but it was found impossible to prove the case; and no defence was made beyond the plea. In *Lord Rochford's Case* Lord Thurlow said, that though it might have been pleaded at law, that did not take away the jurisdiction of this Court to order the instrument to be delivered up: as in the case of a bill of exchange (1), &c. This is a demurrer to the whole bill. It is a demurrer to the relief; which must now be admitted to be sufficient to cover the discovery (2): but there are many facts, which ought to be answered: as, whether the bond is in her possession; whether she pretends, that it was given for any pecuniary consideration, and what that was, &c.

LORD CHANCELLOR [LOUGHBOROUGH]. I have no doubt upon this case. The bill is filed after a verdict at law; and I am now informed, the Defendant put in a plea, upon which, if he had supported it, the consequence might perhaps have been, that the bond would have been void at law: no doubt it would, where it expresses in the consideration future cohabitation; which in one or two instances has come before the Court: in that case in the King's Bench and in a case in the Exchequer upon the administration of Mr. Perkins's assets after his death: the consideration was, that she should continue to live with him; and she forfeited it, if she returned to a proper course of life. In the present case, after a plea was put in and afterwards deserted, I can consider this bill as only for a discovery, and relief, founded upon the legal nullity of the bond, that it should be delivered up. Whatever might have been the course of the cases, where no plea was allowed but payment, nothing *dehors* the deed, the necessity for the interposition of this Court is entirely taken away, when all that matter, that would avoid the bond, might be pleaded at law. (3). The demurrer is very properly general: and

(1) *Newman v. Milner*, ante, vol. ii. 483; *Jervis v. White*, post, vii. 413.

(2) *Fry v. Penn*, *Price v. James*, 2 Bro. C. C. 280, 319; *Measter v. Brampston*, cited 2 Bro. C. C. 282; *Collis v. Swayne*, 4 Bro. C. C. 480; ante, *Loker v. Rolle*, *Ryves v. Ryves*, 4, 343; *Renison v. Ashley*, vol. ii. 459, and the note, 461.

(3) *Collins v. Blantern*, 2 Wils. 341. But this doctrine, that the alteration of the rule of pleading takes away the equitable jurisdiction, is disapproved by Lord Eldon, C. post, vol. vii. 19; Coop. 20, in *Bromley v. Holland*; and in *Haywood v. Dimsdale*, xvii. 111, the jurisdiction to order a deed, forming a cloud upon the title, to be delivered up, though void at law, was maintained: Lord Eldon dissenting from the opinion of Lord Thurlow, *Colman v. Sarrel*, 3 Bro. C. C. 12, ante,

it covers the prayer for discovery. If it had been simply for discovery, and a demurrer had been put in, I should have allowed * the demurrer ; for whatever may be the real transaction [* 372] between the parties, it is to be made out by evidence ; and the Plaintiff has no right to call upon her to discover that turpitude, which is common to him and to her. I cannot compel her to discover, whether before the connexion she capitulated with him for this provision. That would make her liable, not only to the reproach, but to the consequence of having lived in this illicit course of life (1).

There is no ground for the bill ; and the demurrer must be allowed (2).

1. SEE, *ante*, note 1 to *Colman v. Sarrell*, 1 V. 50, that a Court of Equity will entertain a suit for the redelivery of a bond, or other instrument, in some cases where the instrument might be avoided at law.

2. As a general rule, a deed *pro turpi causa* cannot be supported in Equity ; (see, however, *Carey v. Stafford*, 3 Swanst. 429 ;) nor if the consideration appear on the face of the deed, at common law. *Gray v. Matthias*, 5 Ves. 293. And, if a man has purchased an annuity in the name of a woman with whom he cohabits, with respect to his creditors, she will be considered only as a trustee. *Mortimer v. Davies*, cited 10 Ves. 363. But, except in behalf of creditors, property of which a woman has, upon such terms, obtained actual possession, will not, it seems, be taken out of her hands : though (even in favor of the grantor's representatives) she might be restrained from enforcing securities, founded on such immoral consideration. *Rider v. Kidder*, 10 Ves. 366 ; *Whaley v. Norton*, 1 Vern. 483. *A fortiori*, she could not obtain specific performance of a written promise, for which the only consideration was a previous adulterous intercourse. *Matthews v. L—e*, 1 Mad. 565. But, where a deed is executed, not as a bargain for future immorality, but as the *premium pudicitie*, Courts of Equity will lend their assistance to enforce the security. *Knye v. Moore*, 1 Sim. & Stu. 65 ; *S. C.* 2 Sim. & Stu. 260 ; *Spicer v. Hayward*, Prec. in Cha. 115 ; *Cray v. Rooke*, Ca. temp. Talb. 155 ; *Marchioness of Annandale v. Harris*, 2 P. Wms. 433. A bond, however, though given as the *premium pudicitie*, cannot be proved as a debt, should the obligor become bankrupt. *Gilham v. Locke*, 9 Ves. 614 ; *Ex parte Ward*, cited 15 Ves. 290 ; *Turner v. Vaughan*, 2 Wils. 340. A provision, freely made, on account of past cohabitation, may be good, although the woman was of abandoned character before her connection with the settlor. *Hill v. Spence*, Ambl. 643 ; *Atkins v. Farrer*, 1 Atk. 287. Fraud, of course, on her part, would taint the transaction, and the circumstances must determine its validity. *Whaley v. Norton*, 1 Vern. 484 ; *Bainham v. Manning*, 2 Vern. 241 ; *Clarke v. Periam*, 1 Atk. 233.

vol. i. 50 ; and of Lord Loughborough in this case ; and the Court of Exchequer, in *Gray v. Matthias*, *post*, v. 286.

(1) *Ex parte Paxton*, *post*, vol. xvi. 289.

(2) *Gray v. Matthias*, *post*, vol. v. 286.

SEAGRAVE v. EDWARDS.

[1797, MAY 19.]

WHERE there is only one Defendant, after all the process of contempt for want of an answer the bill may be ordered to be taken *pro confesso* upon motion. (a)

THE bill was filed by residuary legatees against the surviving executrix for an account. An appearance was entered for the Defendant under the statute (1): but she stood out all process of contempt for want of an answer; and being brought up in custody, Mr. Cullen for the Plaintiffs moved, that the bill might be taken *pro confesso*.

The Solicitor General [Sir John Mitford] stated the practice to be, that where there is only one Defendant, the bill may be ordered to be taken *pro confesso* upon motion: but if there are more Defendants, the cause must be set down.

There being no other Defendant in this case, it was ordered, that the bill should be taken *pro confesso*.

1. For the general rules as to taking a bill *pro confesso*, see the notes to *The Attorney General v. Young*, 3 V. 209.

2. It should be observed that, although a cause must, according to the existing practice, (but for the alteration of which a bill is now (1827) pending in parliament,) be set down, before it can be taken *pro confesso*, where there are more defendants than one; yet, such cause may be advanced to the head of the paper, on motion; *Hart v. Ashton*, 1 Mad. 175; for it is in the discretion of the Court to direct any cause to be advanced, on sufficient allegation, and when that measure appears necessary in order to do complete justice. *Hoyle v. Livesay*, 1 Meriv. 382. Where there is only one defendant, the rule laid down in the principal case, of allowing the bill to be taken *pro confesso* on motion, was recognized in *Lewis v. Marsh*, 2 Sim. & Stu. 220.

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MATHER, *Ex parte*.

[1797, MAY 20.]

BILL, indorsed to a broker in consideration of money paid by him in effecting insurances; one of which was illegal: the acceptor becoming bankrupt, the petition of the indorsee to prove was dismissed as to what arose upon the illegal insurance; and, the bankruptcy being some years ago, an inquiry was directed as to the rest. (b)

A. employed by B. to buy smuggled goods pays for them, and they come to the hands of B.: B. shall not pay for them, [p. 373.]

CHIPPENDALE employed Mather, a broker, to effect an insurance upon a voyage from Ostend to the East Indies, which was illegal;

(a) When Bills shall be taken *pro confesso*, see, *ante*, p. 209, *Attorney General v. Young*; *Carnes v. Fisher*, 1 Johns. Ch. 8; *Boudinot v. Symmes*, Wallace, 139.

(1) 5 Geo. II. c. 25.

(b) See Story, Bills, § 186.

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and in consideration of the money laid out by Mather in effecting that insurance, and also a valid insurance for life, Chippendale indorsed to Mather a bill of exchange drawn by Chippendale and payable to his order. This bill was accepted by James, who afterwards in 1791 became a bankrupt. The petition was presented by Mather, praying, that he might be admitted to prove under the commission.

Mr. *Piggott* and Mr. *King*, for the petition, insisted that the consideration was good as between the drawer and the indorsee; and there could be no objection, because between the drawer and some person not appearing on the bill there had been illegal transactions. They cited *Falkney v. Reynous*, 4 Burr. 2069, and *Petrie v. Hanney*, 3 Term Rep. B. R. 418. They contended, that at least the petitioner had a right to prove so much as related to the insurance for lives.

Attorney General [Sir John Scott] and *Solicitor General* [Sir John Mitford], for the Assignees. The question is, whether the policy of the law does not require, that Courts of Justice should not assist such transactions as this. The consideration being void is void as to all the parties to it. Lord Thurlow certainly disapproved those cases. If this bill is to be paid, there is no law against such transactions. If the bill is bad at all, it must be bad altogether.

LORD CHANCELLOR [LOUGHBOROUGH]. I am perfectly aware of both the cases cited: but I cannot perfectly accede to them. What is called a consent in these cases is a confederacy to break a positive law. I have often had occasion to think of these cases upon lottery insurances, &c.; and it never occurred to me to be possible to state a distinction between them and a case repeatedly adjudged: if a man is employed to buy smuggled goods; if he paid for the goods and the goods come to the hands of the person, who employed him, that person shall not pay for the goods. But as to the insurance for lives, he may divide the debt. The equity is, that where the *consideration consists of two parts, one bad, the [*374] other good, the bill should stand as to what is good.

For the Assignees. The bankruptcy happened in 1791; and they come in 1797. It does not appear, whether it was not a gambling policy.

LORD CHANCELLOR. Very possible. The only order I should have thought of making would have been to dismiss so much of the petition as arises upon the insurance as to the Ostend voyage, and to inquire into the transaction as to the insurance for lives.

It was so ordered (1).

SEE, *ante*, the notes to *Brandon v. Johnson*, 2 V. 517, with respect to demands arising out of illegal transactions.

(1) *Vandyck v. Hewett*, 1 East, 96. See *post*, *Watts v. Brooks*, 612, over-ruled as to the latter point: *Thomson v. Thomson*, vol. vii. 470; *Knowles v. Houghton*, xi. 168; *Ex parte Bulmer*, xiii. 313, 545; xv. 469; *Otley v. Browne*, 1 Ball & Beat. 360.

v. *Saville*, cited 1 Ves. 548; Amb. 371. *Oxendon v. Lord Compton*, ante, Vol. II. 69.

Mr. *Mansfield*, for the Defendant William Powlett Orde Powlett. This is not like any decided case. The person entitled must be by analogy to the rules of law a person having a complete estate of inheritance. The first son of Mrs Orde, who was not born till after the severance, and who lived only five days, never had any right to the estate, of which the timber was part. His estate was liable to be divested by the birth of a son of the Duke; it is [* 377] * impossible therefore to consider him as having any vested right. Lord Thurlow thought the claim on his part utterly impossible. When the Court interposes in such a case to preserve the money, what can be done but to give it to the person having the first vested estate of inheritance; to whom the timber would belong, if it was felled by any one? If the timber was now upon the estate, it would belong to this Defendant. As to the other claim, the money is to be considered just as the timber; the tenant for life therefore is not at all concerned; and cannot have any benefit from the interest. The money cannot be considered as real estate, or to be laid out in land; for then it must be applicable to all the uses of the settlement; and might go to the Duke; but the Court would never suffer him to be benefited by his wrongful act.

Mr. *Alexander*, for the Duchess of Bolton, said, he was not instructed to press her claim.

LORD CHANCELLOR [LOUGHBOROUGH]. The only *scintilla* of right, she has as representing the Duke, would be to take this after all the uses of the settlement are exhausted; supposing it is to be laid out upon those uses.

I should like to know, whether there is any account of that case of *Saville v. Saville* (1): but independent of that, I think it impossible for the Court to decree it to belong to any person, who could not by possibility have a legal title. In *Whitfield v. Bewit* the Court held it a mere casualty; and that there was no equity to take it from the person, who had a legal title and could have brought an action of trover. When this timber was cut, no doubt, at law the Duke would have taken, being the first owner of the inheritance; but the Court very properly held, that he should not by a fraud upon the settlement, which made him tenant for life, gain that advantage to himself in his reversion in fee. Considering it as a wrong upon the settlement, the consequence is, that part of the property, which by the fraud is taken from the settlement, ought to be restored to the settlement. The consequence is, that will carry it throughout to all the uses. It is to be considered as realty; Mrs. Powlett therefore will be entitled to an estate for life: the children to estates in tail male: and I cannot help the consequence of the reversion in fee going to the Duke.

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* Mr. Dickens refers me to a case in point; *Tullet v.*

(1) See 2 Atk. 458. It does not appear there, that the timber was wrongfully cut.

Tullet (1) : the mother claimed as one of the representatives of the infant ; Sir Thomas Clarke decided, that she was not entitled under her own wrongful act : but he directed it to be laid out to the uses of the settlement.

The money was directed to be laid out in land to be settled accordingly.

The *Solicitor General* [Sir John Mitford] mentioned *Tully v. Tully* ; where the same thing was done by Sir Thomas Sewell. Trustees empowered to cut timber to pay debts cut a great deal more than was necessary. Sir Thomas Sewell said, it was an abuse of trust ; that no person ought to take advantage of it, and it should go according to the settlement of the estate (2).

As to the disposal of the produce of timber tortiously felled, see, *ante*, notes 2 and 3 to *Lee v. Alston*, 1 V. 78, and notes 3, 4, 5 and 6 to *Pigott v. Bullock*, 1 V. 749.

WILLS v. STRADLING.

[1797, MAY 24.]

BILL by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense and continuance of possession after the expiration of the old lease and payment of an increased rent under the agreement: plea of the Statute of Frauds ordered to stand for an answer, with liberty to except. (a)

THE bill stated the following case :

The Plaintiff was lessee of a farm for seven years at the rent of 34*l.* a year under the Defendant, the widow of the lessor ; under whose will she is entitled to the premises during her widowhood. The lease being to expire in 1794, the Plaintiff in June, 1793, being

(1) Amb. 370 ; 1 Dick. 322.

(2) *Post*, *Delapole v. Delapole*, vol. xvii. 150 ; *Wickham v. Wickham*, xix, 419 ; *Coop.* 288.

(a) As to the enforcement of specific performance in cases of part-performance, 2 Story, Eq. Jur. § 759 - 768. It is essential that acts of part-performance should clearly appear to be done solely with a view to the agreement being performed. For, if they are acts, which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part-performance of the agreement. Ibid, § 762 ; *Phillips v. Thompson*, 1 Johns. Ch. 149 ; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 263. If the possession be delivered and obtained solely under the contract ; or if, in case of a tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, referrible solely and exclusively to the contract ; there, the possession may take the case out of the statute. Especially will it be held to do so, where the party, let into possession, has expended money in building, or repairs, or other improvements ; for, under such circumstances, if the parol contract were to be deemed a nullity, he would be liable to be treated as a trespasser ; and the expenditures would not only operate to his prejudice, but be the direct result of a fraud practised upon him. 2 Story, § 763, and English cases cited.

desirous of making some improvements upon the premises, which would be attended with a very considerable expense, applied for a new lease for the term of 14 years. The Defendant agreed to grant a lease for the said term, if she should so long live and continue a widow, at the rent of 36*l.* a year; and immediately or very shortly after the agreement the Plaintiff upon the faith of the agreement and in confidence, that he should enjoy for the 14 years under the agreement, began to make improvements, and hath laid out a great deal of money upon the premises. The Plaintiff continued in possession after the expiration of the former lease; and paid the increased rent; for which the Defendant gave him receipts.

The bill prayed a specific performance of the agreement.

The Defendant pleaded the Statute of Frauds, with an averment, that there was no agreement in writing.

Mr. *Romilly*, for the Plaintiff. All the circumstances of part performance, upon which cases have been taken out of the [* 379] Statute, concur *in this case. As to payment of money, 3 Atk. 4. In *Stewart v. Denton* (1) there was only delivery of possession. In *Floyd v. Buckland*, 2 Freem. 268, there was only a wall built. The question is, whether the Plaintiff has put himself to a considerable expense.

Solicitor General [Sir John Mitford] and Mr. *Short*, for the Defendant. As to the delivery of possession, it must be from a person, who is in possession: a mere continuance of possession in a tenant will not do. Notwithstanding what is said in 3 Atk. 4, simple payment of money is no part performance; *Charlewood v. The Duke of Bedford*, 1 Atk. 497. The Statute has made the distinction between goods and land. As to money laid out in faith of the agreement, there is no ground, as it is here stated. It is no part of the contract between the parties, that money should be laid out; and therefore is no evidence of the existence of a contract. This is not the case of a house taken upon a building or repairing lease. The bill does not aver, that it was laid out with the privity of the Defendant. The act stated as a part performance must be an unequivocal act, consistent only with the existence of that agreement stated in the bill. The extent of the improvements, the proportion, they bear to the value of the estate, &c. are not stated. This is not averred to be in pursuance of the contract or in part performance of it. If these cases are looked at, there is not a single case, where it was not an essential part, that possession should be delivered in pursuance of the contract; nor any authority, that a mere holding over and money laid out without any contract stated, that certain things should be done for improvement of the premises, will take it out of the Statute. The payment of the increased rent stands exactly upon the same footing as payment of money upon the sale of an estate; and amounts to nothing. If payment of an increased rent and money expended at the option of the tenant would do, how could a

(1) 1 Fonb. Tr. Eq. 175.

landlord advancing the rent be safe from the mischief, the Statute intended to prevent? It would be very dangerous to admit evidence of conversations upon the single circumstance of payment of an increased rent; which is an equivocal act. The act ought to be unequivocal: from which the Court might see unquestionably an agreement, that would not be good under the Statute; and that the act was done in pursuance of that agreement; which makes it unconscientious to insist upon the Statute. In *Charlewood v.*

*The * Duke of Bedford* a great variety of things was done; [* 380] and there was even a sort of memorandum. The acts were equivocal. It was possible the contract might have been with Rich, not with the Duke. The improvements, might have been for his own accommodation. It was an essential part of that case, that the Defendant insisted, the steward had no right to enter into the agreement. I do not say, it was finally determined upon the incompetency of the circumstances to take it out of the statute. Nothing can be more vague than the allegation in this bill, that the Plaintiff began to make improvements, and hath laid out a considerable sum of money. The plea is proper without an answer: *Cottington v. Fletcher*, 2 Atk. 155; *Hollis v. Whiteing*, 1 Vern. 151: the latter part of that case was over-ruled in *Whitchurch v. Bevis*, 2 Bro. C. C. 564, 565. *Whaley v. Bagenal*, 6 Bro. P. C. 45, is much stronger than this. Lord Thurlow, 2 Bro. C. C. 567, expresses himself very strongly as to that case; saying, it has fixed the rule upon a basis of authority a great deal too strong to be overturned or answered.

Reply. The Statute has certainly been over-ruled in many cases: but it is still more dangerous to over-rule those rules, that are now become as sacred and as well known as the Statute itself. The question now is, whether the Plaintiff is entitled, not to a specific performance, but to any answer from the Defendant. The question, whether it ought to be averred, that there was no such performance as is alleged in the bill, because it would over-rule the other part, was very much discussed in *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, and *Whitchurch v. Bevis*: but the only question there was, whether it did not from that circumstance become impossible to plead the Statute, when the bill alleged part performance: and I believe, in the result Lord Thurlow thought, there might be such a plea. It has been decided, that payment of part of the purchase-money is not a part performance: other cases have held, that it is: but that payment of the whole purchase-money is not a part performance, was never decided; and there is Lord Hardwicke's *dictum*, that it is. In *Charlewood v. The Duke of Bedford* the Plaintiff continued in possession exactly as he held before; and there the plea was ordered to stand for an answer: which is all this Plaintiff desires. But this Plaintiff could not hold under the former lease; the payment of a new rent shows decisively some agreement. It is incumbent on the Defendant to say, what that agreement was. *Hollis v. Whiteing* is not a decision; for in 1 Vern. 159, it went to law: but it has been over-ruled in many cases. In *Whitbread*

v. *Brockhurst* it was pressed upon Lord Thurlow in the strongest manner: who says 1 Bro. C. C. 417, that an agreement partly executed has been considered as out of the statute; that he always thought, the Court considered it as fraudulent to make the contract, and lead on the other party to lay out his money in the melioration of the estate, and then withdraw from the performance of the contract; and whether the money is well or ill laid out is indifferent: the fraud is the same. It was never held necessary to aver, that it was part of the agreement, that the money should be laid out, or that it was with the privity of the Defendant. In *Whaley v. Bagenal* there was no part performance. I rely upon the fact of payment of the increased rent; which is evidence of some agreement; also upon the improvements and money laid out. That it was part of the agreement is not material, if it turns upon fraud.

LORD CHANCELLOR [LOUGHBOROUGH]. In *Whaley v. Bagenal*, there were a vast many circumstances of conduct and behavior upon the supposition of an agreement: but none that amounted to part performance. One strong circumstance was, the vendor setting up that purchase, which he afterwards denied, as a defence against an *Elegit*.

Though in general I feel a very strong inclination to support the Statute of Frauds and to give the party the benefit of it by way of plea, I think, I must in this case call upon the Defendant to make an answer to one part of the bill. Three grounds are stated; possession by the Plaintiff; which he refers to the agreement: payment of an increased rent: which he also refers to the agreement: and the circumstance stated of considerable sums of money having been laid upon the improvement of the farm. As to the first ground, the possession, in the case of a tenant, who of course continues in possession, unless he has notice to quit, the mere fact of his continuance in possession (which is all the plea can admit, for *quo animo* he continued in possession is not a subject of admission,) would not weigh (1). The delivery of possession by a person having possession to the person claiming under the agreement is a strong and marked circumstance: but the mere holding over by the

tenant, which he will do of course, if he has no notice to
[*382] *quit, would not of itself take the case out of the statute or even call for an answer. As to the money laid out I feel the distinction pressed by the Solicitor General very strongly; that if it was part of the contract, that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord) it is very strong to take it out of the statute. But the circumstance, which I think distinguishes this case, is the payment of the additional rent. Payment of additional rent *per se* is an equivocal circumstance, it is true. It may be, that he shall hold over from year to year, the lease being expired. There may be other inducements. But how

(1) 1 Ball & Beat. 282; *Frame v. Dawson*, *post*, vol. xiv. 386.

stands the averment upon this plea? It is, that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the Defendant to say, whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence: it would be a good lease for three years, and would defend the tenant against an ejectment brought within the three first years. *Charlewood v. The Duke of Bedford*, which finally turned upon the want of authority in the steward, is an authority, upon which under the circumstances alleged in this bill the benefit of the plea ought to be saved to the hearing. Let the plea stand for an answer, with liberty to except.

As to the danger mentioned by the Solicitor General, and which I a little anticipated, if the Defendant admits the agreement, as stated in the bill, there can be no danger; if he does not admit the agreement, as stated, it will come to be a very material question, whether I should permit that agreement to be substantiated by any parol evidence (1).

1. NOTHING is to be considered as part performance of a contract respecting lands, which does not put the party seeking a specific execution into a situation which would render it fraudulent in the other party to refuse to perform the agreement. *Clinan v. Cook*, 1 Sch. & Lef. 41; *O'Reilly v. Thompson*, 2 Cox, 273. For instance, when a man is admitted into possession, he is made a trespasser, and is liable to answer as such, if his possession be not referred to the agreement. *Savage v. Carron*, 1 Ball & Beat. 282; *Gregory v. Mighell*, 18 Ves. 333. With respect to a tenant already in possession, the fact of his continuing in possession amounts, indeed, to nothing; but where a person, not previously in possession, makes an agreement with the owner of an estate, and enters into possession, such possession is always to be held a part performance; because it is an act unequivocally referring to the contract. *Morphett v. Jones*, 1 Swanst. 181; *Buckmaster v. Harrop*, 13 Ves. 474; and see the latter part of note 2 to *Selby v. Alston*, 3 V. 339. On the other hand, mere payment of money is not held to be a part performance, entitling the party to a specific execution of a contract; for the money may be repaid, with interest; and then the parties will be restored to their former situation. *Clinan v. Cook*, *ubi supra*; *Frame v. Dawson*, 14 Ves. 388.

2. As to the admissibility of parol evidence, to substantiate an agreement respecting lands, or to repel a demand for specific performance of such agreement, see the note to *Pym v. Blackburn*, 3 V. 34, and the farther references there given.

(1) See *Pym v. Blackburn*, *ante*, 34, and the note in pages, 38, 39, 40.

HORSEPOOL v. WATSON.

[1797, MAY 24.]

DEVISE to A. and his wife for life; and after the death of the survivor upon trust to sell and apply the produce to and among all and every the issue, child or children of A. by his said wife and their representatives equally: the fund belongs to the children surviving the testator: but the issue of a daughter, who died in the life of A. are entitled as representatives against the claim of their father as administrator. (a)

CHARLOTTE STANHOPE devised estates, of which she was seised in fee-simple, to James Horsepool; to hold to the said James Horsepool and Mary, his wife, for their lives and the life of the survivor; and after the decease of the survivor she devised the said premises to Hugh Harding and John Watson and their heirs upon trust to sell and apply the money arising from the sale unto and amongst all and every the issue child or children male or female of the body of the said James Horsepool by the said Mary his wife and their representatives equally share and share alike.

The bill was filed after the death of James and Mary Horsepool by their surviving children, and by Richard Joynes, administrator of his wife Elizabeth, one of the children of James and Mary Horsepool, who survived the testatrix and Mary Horsepool, but died in the life of James Horsepool.

The cause coming on for farther directions, the question was upon the claims of the Plaintiff Richard Joynes, and of his children and other grand-children of James and Mary Horsepool, Defendants.

Mr. *Mansfield*, for the Plaintiffs, contended, that the objects were children living at the death of the testatrix and the representatives of such as might die in the life of the tenant for life.

Solicitor General [Sir John Scott], Mr. *Alexander*, and Mr. *Sutton*, for the grand-children. The grand-children claim under the word "issue." The testatrix uses the words "their representatives" as explanatory of "issue" as well as of "child or children." The word "representatives" is used in the Statute of Distributions. The children represent and stand in the place of their parents: *Bridge v. Abbot*, 3 Bro. C. C. 224. It cannot mean administrators; for they are not issue. The testatrix adverted to the possibility of there being only one child. "Heirs" and such words are to effectuate the intention held to apply to what strictly they are not applicable to.

[*384] *Lord CHANCELLOR [LOUGHBOROUGH]. If the testatrix had used "issue" in the common sense, all the issue of Horsepool and his wife would have been entitled (1). She has defined the issue that shall take: a child or children of James and

(a) As to the qualification the word "issue" will receive, see, *ante*, p. 257 note (a) to *Davenport v. Hanbury*, *Cushman v. Newland*, 2 Bing. N. C. 50; *Clay v. Pennington*, 7 Simon, 370; 2 Williams, Exec. 810, 832.

(1) *Davenport v. Hanbury*, *ante*, 257; and the note, 260.

Mary Horsepool; which I should think must be those that would be entitled to take at the time of her death. Then the possibility of its coming at a very remote period occurred; and that some of the children who might be capable of taking, might die in the life of their parents; and then she throws in the word "representatives." What I go upon is, that I think "issue" is not an idle word: it qualifies the word "representatives." She explains what she means by the general word; children and their representatives, being issue.

SEE, *ante*, notes 1 and 2 to *Hockley v. Maubey*, 1 V. 143, as to the varying construction of the word "issue," when found in a will.

EARL OF DARLINGTON v. PULTENEY.
LADY CAVAN v. PULTENEY.

[1797, JUNE 3, 19.—ANTE, VOL. II. 544.]

UPON the hearing of these causes the Lord Chancellor was of opinion, as to the form of D.'s bill, there was great weight in the objection, that the whole was arranged in the former cause; and if there was any omission in the decree, that was not the subject of an original bill: as to the merits, that though the assets of A. would be liable to the lessees upon eviction, the benefit of putting a party to election does not extend to a residuary legatee; and that neither D., as a disappointed devisee, nor *a fortiori* the lessees, could raise that equity against C., holding as tenant by the courtesy under the election, that B. had made, to take her estate tail against the will of A. The bill of D. therefore was dismissed; and that of the lessees retained, in order that, when they should have ascertained their damages, they might have satisfaction from the assets of A.; part of which had been received under his will by C. (a)

THESE causes, reported *ante*, Vol. II. 544, upon the motion for an injunction, were argued upon the 15th, 16th, 21st and 22d of November. The arguments upon the merits were to the same effect as upon the former occasion. An objection of form was made; that if there was any omission in the former decree, that was not the subject of an original bill.

LORD CHANCELLOR [LOUGHBOROUGH] (after stating the case). The suggestion of Lord Darlington's bill is, that General Pulteney having by his will disposed of all the real property, he had, as well from Lord Bath as his grandfather and Mr. Guy, and having by the same will given several benefits to Sir William Pulteney, namely, the reversion of the Bradford estate, and a moiety of the sum of 38,136*l.* 16*s.* 1*d.* secured by mortgage on that estate, for life, with limitations to his wife and issue male, Sir William Pulteney taking benefits under that will is bound to confirm any act, General Pulteney had done; (when I say bound, I mean bound electively,) or otherwise in the alternative, that the Court will lay hold of any interest, he

(a) See, *ante*, note (a) to S. C. 2 V. 544.

has, derived to him under the will of General Pulteney, to make satisfaction. It is to be remembered, that in 1768 a bill [*385] was filed in this *Court against Sir William Pulteney and Mrs. Pulteney; and the question was much agitated. The great question in that cause was, whether Mrs. Pulteney could make an election. It was contended, that she could not; being a married woman. Whether she was bound to make an election, or not, the will made by General Pulteney must be understood to impose upon her in nature of a condition an obligation to conform to that will; or if she did not, to forfeit all (1) the interest, she took under it. In the result of that cause the decree determined, that she was bound to make an election; and an order was made, that she should make her election. After this decretal order it was referred to the Master to inquire, whether it would be most for her benefit to claim under the will of Sir William Pulteney or under the will of General Pulteney. The report stated, that it would be most for her benefit to take under the will of Sir William Pulteney. Then, instead of taking an account of all, she had received from the devised estates, which General Pulteney had a right to devise, and an annual account of all she might afterwards receive, a proposal was made, that a value should be set upon the whole of the devises in her favor by the will of General Pulteney, and that she should secure that value in trust for the uses of the said will by a charge upon the estates of Sir William Pulteney. The sum was 61,000*l*. She elected therefore to take by her paramount title an estate-tail; and she suffered a recovery, and disposed of that by her will; and having issue by her, Sir William Pulteney is in as tenant by the courtesy; a right derived from the seisin of his wife.

Lord Darlington contends in two characters: as remainder-man under the will of the devised estates; and also as residuary legatee of the personal estate. It is a little difficult to conceive, how as residuary legatee of the personal estate he should state himself to be a person, in whose favor this Court would interpose against any person claiming specifically under the will: for the residue is only what remains after all the debts paid; and if a particular demand of any person taking a benefit under the will subjects the personal estate to a debt, the cases have not reached so far, as that the benefit of putting a party to election can ever go to a residuary legatee of the personal estate. In opposition to this claim of Lord Darlington it was argued, that the whole matter was completely and definitively arranged in the cause, that commenced in 1768: the rights of all these parties, and all the points, that could be [*386] raised, *were settled in that cause. Therefore it was contended, that it was not according to the practice of the Court to permit an original bill to be filed upon the same matter, as was put in issue in that cause; supposing, a direction, that ought

(1) Whether the effect is forfeiture or compensation, see the note, *ante*, vol. i. 523; and upon the doctrine of election generally, *Blake v. Bunbury*, *ante*, vol. i. 514, and the note, 527.

to have been given at that time, was omitted; and I think, there is great weight in that objection. But my opinion does not turn entirely upon that; for, without going through the whole course of the argument, which was very ingeniously and with great ability urged, I had upon the motion considered it with a good deal of care and attention; and my mind has been much exercised upon it; and, whatever inclination I have to support the lessees in that possession, which they certainly took *optima fide*, yet I cannot find a principle, upon which I can support the relief up to the extent prayed by Lord Darlington; for this appears a clear proposition; that when Mrs. Pulteney made her election, which the Court decreed she was bound to do, and the result (I lay no stress upon the report of the Master, that it was most for her benefit) was, that she took under the will of Sir William Pulteney, the estate, she so took, was completely evicted, and never could revert to the uses of the will or be affected by any clause of that will. The rights of all those taking that estate must be derived in some degree from her right; which was an absolute right of property; a right to say, "This is my estate: it was not capable of being devised by General Pulteney: I repudiate all right, he has given to me by his will: and take that estate *jure meo*, as the law gives it to me." The consequence is, she may do as she pleases; and all the rights incident to her estate must be preserved. Her husband's estate is an emanation from her's. Upon the motion I referred to the expressions of Chief Justice De Grey and Baron Eyre according to the note, I took; and which therefore I need not now repeat. That estate was as much blotted out of the will, as if the testator had himself struck completely out of it all, that regards that estate. We have no right to open the will, or to talk of what General Pulteney did with regard to that estate, the moment an absolute owner says, "it is my estate: I have made my election to take it." The only question now is, whether any person asserting a right under the will of General Pulteney has a right to interfere with any act Sir William Pulteney thinks fit to do, holding that estate as tenant by the courtesy. Upon that ground I feel myself obliged to dismiss Lord Darlington's bill; and I think likewise, there is great weight in the objection urged for the Defendant, that the whole matter was exhausted by that decree; and upon
 * the supposition, that any thing was omitted in that decree, that is not matter for an original bill. [* 387]

The lessees can raise no equity upon the same ground. *A fortiori* it applies more strongly to the lessees: but they have a clear right as to one part of the prayer of their bill: in case of eviction they may recover upon the covenant out of the general assets of General Pulteney; I must therefore retain that bill. They would have a right to an account of the assets; the assets being administered in this Court. It will be for their own consideration what course of proceeding to institute. The natural way is to bring actions upon the covenant for quiet enjoyment. Upon that they are undoubtedly entitled to damages. After that recovery, when

the damages are ascertained, there will be a ground to apply to this Court to make that satisfaction to them out of the assets. I do not mean to order an action to be brought

Dismiss Lord Darlington's bill entirely without costs. The other bill I must retain against all parties, dissolving the injunction; with liberty to the lessees to bring such an action as they shall be advised, to ascertain their damages in being evicted from the possession held under the leases made by General Pulteney (1).

SEE, *ante*, the notes to S. C. 2 V. 544.

THE DUKE OF NEWCASTLE v. THE COUNTESS OF LINCOLN.

[1797, JAN. 25, 31; FEB. 1; JUNE 3.]

COVENANT in a marriage settlement to settle leasehold estates in trust for such persons and such of the like estates, ends, intents and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders: the Court in executing the covenant declared, that no person should be entitled to the absolute property, unless he should attain twenty-one, or die under that age, leaving issue male. (a)

By indentures of lease and release, dated the 13th and 14th of May, 1772, reciting, that in consideration of an annuity of 3000*l.*, to be paid to the Earl of Lincoln during the joint lives of the Duke of Newcastle and the Duchess Dowager of Newcastle, and a farther annuity of 1000*l.* to be paid to him after the decease of the said Duchess during the joint lives of the Duke and the said Earl, and in consideration, that the Duke had expended upwards of 70,000*l.* in building the mansion house at Clumber, which he had agreed to settle in manner thereafter mentioned for the benefit of the Earl of Lincoln and his issue male after the decease of the Duke of Newcastle, for the residence and farther support of the honor

[* 388] *and dignity of the family in the descendants of the said Duke and the said Earl of Lincoln inheritable to the duke-

(1) See the consequence of this decision, namely: The account of the mesne profits against the tenants. *Pulteney v. Warren*, *post*, vol. vi. 73.

(a) In cases of marriage articles, Courts of Equity will, from the nature of the instrument, presume it to be intended for protection and support to the interests of the issue of the marriage, and will, therefore, direct the articles to be executed in strict settlement, unless the contrary purpose clearly appears. For otherwise it would be in the power of the father to defeat these purposes, and to appropriate the estate to himself. But in executory trusts under wills, all the parties take from the mere bounty of the testator; and there is no presumption, that the testator means one quantity of interest, rather than another, an estate for life in the parent, rather than an estate tail; for he has a right arbitrarily to give, what estate he thinks fit, to the parent, or to the issue. 2 Story, Eq. Jur. § 984; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 550.

dom of Newcastle, and in consideration of the Duke's having engaged to settle for the like benefit of the said Earl certain messuages, lands and hereditaments in Aldborough in the county of York, of which he was seised in fee, and also his leasehold manor and lands of Newark in the county of Nottingham, holden by grant from the Crown, for the like benefit of the said Earl, as thereafter mentioned, and for other considerations, the said Earl had agreed to join with the said Duke in suffering recoveries to bar the several estates and remainders, in tail vested in the said Earl and to take effect on the decease of the Duke, and for settling the inheritance of the premises therein particularly mentioned in manner thereafter expressed, in order to continue the same in their blood and family, the said Duke and Earl did thereby grant and convey certain estates in the counties of Nottingham, York, Middlesex and elsewhere, unto John Rayner and his heirs, to make him a tenant to the *Præcipe*, in order that recoveries might be suffered thereof, to enure, subject to the several annuities thereby granted, to the use of the Duke of Newcastle for life without impeachment of waste; remainder to the Earl of Lincoln for life; remainder to his first and other sons in tail male; remainder to Lord Thomas Pelham Clinton, second son of the said Henry Duke of Newcastle for life; remainder to his first and other sons successively in tail male; with divers remainders over; with a power to the Duke of Newcastle and the Earl of Lincoln jointly to revoke the uses declared and to appoint new uses; and with a power to the Duke of Newcastle of making leases; and the Duke of Newcastle covenanted to convey the said manors and lands of Newark, that were granted by his present Majesty to the said Duke, to Sir John Shelly, to hold the same for the terms therein mentioned in trust for the said Henry Duke of Newcastle and his assigns for his life; and after his decease in trust for the said Earl of Lincoln for the term of his life; and after his decease in trust for the first and every other son and sons of the said Earl of Lincoln successively as far as the law would allow.

By indentures, dated the 19th and 20th of May, 1775, reciting, that upon a treaty of marriage it had been agreed, that the Duke of Newcastle and the Earl of Lincoln should revoke the uses declared by the indentures of 1772 concerning the premises thereby granted and released, and should limit, appoint and settle, the same to the *uses after mentioned; and that the Duke of [*389] Newcastle had not made any grant, assignment or transfer, of the lands at Newark to Sir John Shelly pursuant to the covenant in the indentures of 1772, it was agreed, that the said Duke should grant, assign, transfer and assure, the said manor of Newark and other the leasehold premises, held of the Crown, in trust to and for the benefit of such person and persons, and for such intents and purposes, as thereafter expressed concerning the same; and it was witnessed, that the Duke of Newcastle and the Earl of Lincoln did thereby revoke the uses of the indentures of 1772; and in consideration of an intended marriage between the Earl of Lincoln and

Lady Frances Seymour Conway and other considerations the said Duke of Newcastle and Earl of Lincoln did grant, release and confirm, several estates in the counties of Nottingham, York, Middlesex, Surrey, and Lincoln, to trustees and their heirs, after the said marriage, subject to certain rent-charges and terms for years, to the use of the Duke of Newcastle for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to trustees for 1000 years for securing portions for daughters and younger children; remainder to the Earl of Lincoln for life; remainder to the first and other sons of the said marriage successively in tail male; remainder to Lord Thomas Pelham Clinton, second son of the Duke of Newcastle, for life without impeachment of waste; remainder to his first and other sons successively in tail male; remainder to Lord John Pelham Clinton, third son of the Duke of Newcastle, for life, and to his first and other sons successively in tail male: remainder to the use of the first and other daughters of the Earl of Lincoln successively in tail; with divers remainders over; remainder to the Duke of Newcastle in fee; with powers to sell or exchange; and that the estates purchased or taken in exchange should be settled to the same uses, or as near thereto as the deaths of parties and other contingencies would admit; and the said Henry Duke of Newcastle did farther covenant with the said trustees, that he, his executors, administrators or assigns, would well and sufficiently transfer and assign to them the said manor of Newark and all the said leasehold premises, granted by his present Majesty to the said Duke by letters patent bearing date the 7th of February, 1761, and all the estate and interest, which the said Duke then had, or should have or be entitled to in the said leasehold premises, to hold to the said trustees, their executors, administrators and assigns, in trust for and for the benefit of such person and persons, and for such or the like estate and estates, and for such or the like ends, intents and [* 390] * purposes, as are thereinbefore mentioned of and concerning the said castles, honors, manors, messuages, lands, hereditaments and premises, thereinbefore limited and appointed and granted and released, as aforesaid, as far as the law in that case would allow and permit; and until such transfer that the said Duke, his executors, administrators and assigns, would permit the rents and profits of the said leasehold premises to be received by such person and persons as should under the limitations declared concerning the real estates from time to time be entitled to enjoy the same; with power to the Duke of Newcastle and the Earl of Lincoln to lease for twenty-one years at the most improved rents, &c.

The marriage took place. The Earl of Lincoln died in October, 1778; leaving issue of the said marriage one son, Henry Pelham Clinton, and one daughter, Catherine Pelham Clinton. The son died in September 1779 without issue, being an infant of the age of nine months. Henry Duke of Newcastle died in February 1794; and was succeeded in the title by his only surviving son, Lord Thomas Pelham Clinton; who died in May 1795.

The bill was filed by Henry Duke of Newcastle, eldest son of Thomas Duke of Newcastle, by the Duchess of Newcastle his mother and next friend, among other purposes, to have the settlement of 1775, as far as respects the performance of the covenant to convey the leasehold manor and premises at Newark, established and carried into execution; and for that purpose the bill prayed, that it may be referred to the Master to settle a proper conveyance; and that such a clause may be inserted therein, as shall prevent the absolute vesting of the said leasehold property, until the persons successively entitled to the possession of the same shall have attained the age of twenty-one years; or that such other conveyance thereof may be made, as shall best give effect to the intention of the parties to the said settlement; and that the Defendant Frances Countess of Lincoln may account for all sums of money received by her in respect of the rents and profits of the said leasehold manors and premises accrued since the death of Thomas Duke of Newcastle.

The Defendants the Countess of Lincoln and her daughter Lady Catherine Pelham Clinton by their answers insisted, that upon the death of the Earl of Lincoln in 1778, his son Henry Pelham Clinton became entitled under the said settlement and the covenant of his *grandfather the Duke of Newcastle to [*391] have the manor of Newark and the other leasehold premises assigned to or in trust for him, his executors, administrators, and assigns, expectant on the death of his said grandfather, absolutely and for his and their own use and benefit; and that upon his death the Countess of Lincoln became entitled as his administratrix in trust for herself and her said daughter, as the only next of kin of the said Henry Pelham Clinton, in equal moieties.

The Countess of Lincoln was in possession of the said leasehold premises under an assignment by the executors of Henry Duke of Newcastle.

Solicitor General [Sir John Mitford], Mr. Lloyd, Mr. Galley, and Mr. Sutton, for the Plaintiff, and Mr. Richards, for Lord Thomas Pelham Clinton and his sister, entitled in remainder under the settlement. This being merely a minute of an agreement to be executed by a subsequent conveyance is to be construed very differently from an actual conveyance, or even a limitation by will. By the Defendant's construction the Court must strike out the words "every other son and sons successively," and hold it intended for the first son only. The contract must be executed according to the intention of the parties: and succession was intended. Upon this principle trustees to support contingent remainders are often inserted; the words "heirs of the body" are construed "first and other sons," &c. If a bill had been filed against the Duke for execution of the covenant, it would have been limited so as to go to the sons successively. It might have been limited to the sons successively at twenty-one. This case has not been expressly decided: but the reasoning upon the other cases applies exactly to this.

There is a manifest difference between this case and *Vaughan v. Burslem*, 3 Bro. C. C. 101, and other cases upon wills. The motive is expressly to be for the honor of the family and in order to continue the same in his blood and family. This covenant is to be considered as a marriage article. There is no doubt, the intention was to provide for the issue male in succession, and to make these freehold and leasehold estates go together, and with the Dukedom, as far as the rules of law would allow. In all the cases the difference is admitted between a marriage contract upon valuable consideration and a will with a perfect trust; upon which the Court has only to declare the effect of the words. An estate to A. for life and after his death to the heirs of his body is a will in an [*392] estate-tail; * in articles, if no settlement has been made, a strict settlement will be directed; *Trevor v. Trevor*, 1 P. Will. 622: if a settlement has been made, it will be rectified. If as to freehold estate the Court would execute articles in as strict a manner as a conveyancer could draw it, why not as to leasehold? It appears from Lord Hardwicke's opinion in *Gower v. Grosvenor*, 3 Barnard, 54, and Sir Joseph Jekyll's in *Stanley v. Leigh*, 2 P. Will. 689, that it was then familiar to limit leasehold estates in this manner. In *Bale v. Colman*, and *Seale v. Seale*, 1 P. Will. 142, 290, there was no executory trust; therefore the Court held themselves bound. In *White v. Carter*, Amb. 670, a strict settlement was directed in the case of a will; the trust being executory, and a succession clearly intended. *Trafford v. Trafford*, 3 Atk. 347. In *Foley v. Burnell*, 1 Bro. C. C. 274, and the other cases, that will be cited for the Defendant, down to *Fordyce v. Ford*, (*ante* Vol. II. 536), it will be found, the words were not near so extensive and plain as in these articles: the Court had no latitude: there was no executory trust. In *Pelham v. Gregory*, and *Spencer v. The Duke of Marlborough*, 5 Bro. P. C. 435, 592, there was a clear estate-tail. Could Lord Lincoln, to whom an interest for life only is given, be intended in the event of his surviving that son to take the whole to the exclusion of the other children? In Powell's edition of Fearn's Executory Devises, 482, all the cases are considered; and our distinction is expressly approved by Mr. Fearn.

Attorney General [Sir John Scott], Mr. Mansfield, and Mr. Romilly, for the Defendants, Lady Lincoln and her daughter. The settlement of 1772 does not mention any purpose as to the manor of Newark to continue it in the blood of the family; as it does as to one class of real estates; the uses of which embrace all the younger branches of the family: but the purpose as to the Newark property is confined to the benefit of the Earl of Lincoln and his issue male; having no limitation for the benefit of the younger branches. It is impossible, that the Plaintiffs can ask a literal performance of the terms of the covenant. They must satisfy your Lordship, that the Court has not adopted that species of limitation, which would vest in the eldest son upon his birth the absolute interest in the leasehold estate; but has adopted some other particular limitation, they can define, or

some one of the various limitations, they state as being within the compass of the general words. There is not a hint in the bill of the particular limitation intended, short of tying up the property for a life in *being and twenty-one years. It is [*393] impossible to distinguish *Vaughan v. Burslem* from any case upon marriage articles or covenant. The Plaintiffs contending, according to what Sir Joseph Jekyll, 2 P. Will. 689, states to be the course of settling terms for years, that the first son ought to have an alienable estate, but not till the age of twenty-one, forget that if he died three months under that age, he might leave issue; in which issue the leasehold estate in that way of putting it would not vest either as issue or next of kin. They are bound to state, what is the distinct proposition, they contend for, short of that utmost limitation, which the law will admit. If the Court is not to go the whole length the law will admit, it must be construed with regard to the context and what is a reasonable construction, and the habitual construction; if it can be stated, that there is an habitual construction of them. The rules of the law are held to beat down the intention; and though the intention fails, that cannot be helped, unless the parties express themselves clearly upon the subject. Neither Lord Hardwicke nor Sir Joseph Jekyll thought, that under these words the Court was to make limitations, that would fall within the intent and meaning of the precise words; but seem to have selected limitations which might be thought reasonable and fair limitations upon such words; and they had different opinions upon it. But neither the practice of conveyancers nor a research into the cases can furnish any rule of construction upon such a covenant. If so, we are now to consider, what the Court has done in cases, where similar points have arisen upon contracts of purchase either by marriage or other valuable consideration. The liberal construction of the words "heirs of the body" and the insertion of trustees are not confined to marriage settlements, but extend to wills where the intention not to use the words in their technical sense appears: otherwise in a deed or a will technical words must have their legal effect: but in a marriage article or covenant, as it could not be the intention to give the estate at once to the husband, the Court substitutes words to effectuate the intention by preventing the husband from taking absolutely, and restraining him to an estate for life: but the Court goes no farther. In other respects there is no difference between a covenant and a will. In *Foley v. Burnell* your Lordship truly observed, that in *Gower v. Grosvenor* Lord Hardwicke decided nothing as to the interest of a son, if he had been born, and had lived but an instant. It was not the impression of your Lordship's mind, that if an infant son had come in being, he would not have been entitled to the absolute property in the *personal estate. As to [*394] *Foley v. Burnell*, this Court is in the habit of permitting personal things to be enjoyed as heir-looms. I do not state that case as deciding what the Court would have done, if instead of a perpetuity intended the words "as far as the law will allow" had

stood a part of that case. Deciding for the Plaintiffs, your Lordship cannot give your assent to *Vaughan v. Burslem*. According to what Lord Thurlow says there, these parties seem to have known, that the leasehold estate could not go so far as the real. Lord Thurlow would not execute so much of the intention as the law would admit, unless the testator told him, how far he meant it to go. The words could give him no farther intimation than, as far as he possibly could; and that was a construction, he would give to no instrument; neither a marriage settlement nor a will.

LORD CHANCELLOR [LOUGHBOROUGH]. I perfectly agree with that reasoning in *Vaughan v. Burslem*; which, I think, cuts all the cases upon wills; for it is not true, that you are to do for the testator all, that can be done by law. You are to do for the testator no more than what he has intended to be done, and according to the common acceptation of the words. I lay no great stress upon those words "as far as the law will admit." I think, there is no particular magic in them at all; but I wish to put it to you, whether in the nature of things there is not a radical and essential difference between marriage settlements and wills. The parties contract upon a settlement for all the remainders. They are not voluntary, but within the consideration. The issue then are all purchasers. Suppose then a settlement to be made of freehold estate; and as to the leasehold there is only this article that the settlement shall be analogous to that of the freehold: do I execute it, and make a like settlement by giving an interest, which cuts off all the issue? Suppose, the whole subject was leasehold estate, and stood upon an article, that it should be conveyed according to the limitations of an Honor; and a bill was brought to carry that settlement into effect, after a child had lived a day: should I permit the father to say, it was his property? It is utterly impossible to make the identical settlement of the leasehold estate as of the freehold: but if I am to make it in analogy to the settlement of the freehold, shall I not carry it on to all the near events: and shall they fail, because I cannot embrace all the remote events? In the case I put, that it was to be settled as near as could be according to the limitations of an Honor, there

[* 395] could be * no doubt of the intention, that it should go from son to son. In common events it is a much more probable event, that a new-born child should die, than the mischief, you apprehend, that a son should have a child, and live till very near the age of twenty-one, and then die.

For the Defendants. That son attaining the age of 14 may make a will; and would be apt to give it to his wife and child. A vast number of inconvenient cases may happen. When the son attains 21, the father may not join with him in a recovery: if he does it may not be suffered; for the son may die first. They do not desire the Court to make the limitation as strictly as the law will allow; and yet the intention for that purpose is the whole foundation of their argument. There is no magic in those words. Perhaps one may without impropriety say, there is no meaning in them; for

when a man directs limitations, he must be taken to mean, as far as the law will permit ; and it was so stated by some of the Judges in *Foley v. Burnell* in the House of Lords. The addition of one line would have explained the intention, if it was what is contended by the Plaintiffs. The Court has in many cases refused to execute the intention, where it is not sufficiently expressed ; *Whateley v. Kemp*, cited 2 Ves. 358 : *Highway v. Banner* 1 Bro. C. C. 584. The various opinions have shown, that no one mode has been agreed on as better than that, which has prevailed in actual settlements ; which only throws it back upon the father of the family to make such settlement, as according to the circumstances may be proper.

Reply. Nothing can be more different than articles and a will. In the latter the voluntary effusions of the mind and caprice of the testator direct every thing. If it contains contradictory intentions, that, which is most for the benefit of the immediate devisee, shall take place. In a covenant there are two parties ; and the objects of it are to be considered. The Court is to decide upon what it supposes to be the intention of all the parties ; judging, not only from the words, but the transactions, in which they are engaged. This applies, not merely to marriage articles, but to all covenants. If there is only a general article for a lease of land, the Court would insert all the usual covenants according to the custom of the country, &c. In some cases of wills there have been decisions nearly approaching this principle ; where the testator has shown an intention, that other persons shall be called in to complete that, of which * he gives a mere note ; as where he directs a con- [* 396] veyance : *Baskerville v. Baskerville*, 2 Atk. 279.

The question is, whether this leasehold estate is to be conveyed in the precise words, in which the freehold has been limited, or in words adapted to the nature of the property, and to carry it in the line of the limitations of the freehold as far as the different nature of the two estates will permit. The whole being executory, it is to be executed by such a conveyance, as will be as near the intention, as the rules of law will admit. The intention is to guide : but upon such an instrument it is to be collected in a very different way from the intention of a will, generally speaking. The contract here includes, not the first son only, but also the second, and several other persons ; and the ultimate remainder is to be to the Duke himself.

The language of Lord Cowper in the preamble to the decree in *Lord Stamford v. Hobart*, 1 Bro. P. C. 291, is very strong for this principle. This distinction between a will or articles executed and articles executory is acknowledged in many cases : *Griffith v. Buckle*, 2 Vern. 13 : *Kentish v. Newman*, 1 P. Will. 234 : *Streatfield v. Streatfield*, For. 176. *Bale v. Coleman*, and in *Vaughan v. Burslem*. I have a short note of one observation of Lord Thurlow in *Vaughan v. Burslem* ; which I take to be the precise ground of his decision. He said, that personal property could not be made unalienable but by preventing the use from springing in the person, to whom the testator had given an estate-tail in the real estate ; and it was as

much the intention, that the use should spring in the person, to whom the property was limited, the moment he was to take, as that the property should be limited, as far as the law would permit. He had two contradictory intentions. He had not expressed, that the use should not spring at the moment; and if it did spring, it became absolute. The same sort of reasoning applies to limitations to A. for life; and then to the heirs of his body. It is intended, that they shall take in the character of heirs: then, says Lord Thurlow in many cases (1), they must take in the quality of heirs. But that would not be the construction of marriage articles, where the intention is, that they shall take by purchase, and therefore not in the quality of heirs. In *Whateley v. Kemp* and *Highway v. Banner*, the

Court thought, there was not sufficient to show, it was not [*397] intended to be in the *very words used. Lord Northington who made the decree in *White v. Carter*, afterwards affirmed by Lord Camden, was by no means of a disposition to go beyond the expressions of an instrument. *Dod v. Dod*, Amb. 274, shows the same distinction. In *Bagshaw v. Spencer*, 1 Ves. 142, 2 Atk. 246, 570, 577, Lord Hardwicke unfortunately made use of some words, that seem, as if he meant to destroy the distinction between trusts executed and executory: but he has frequently appeared anxious to show, he did not mean to do that: it would overthrow all the cases (2). It is a very common thing for people to marry upon a loose article for a settlement with a provision for younger children: would it be endured, that each child should take its portion immediately upon its birth; and that if they all died, the father should take the whole sum, and the estate should go subject to that charge for him?

There is a very ingenious note by Mr. Powell in his edition of Fearn's Executory Devises, 467; in which he seems to consider this point as not in terms decided; and distinguishes clearly between these cases and those, where there is nothing executory; and particularly considers *Vaughan v. Burslem*. It is decided in principle; if not specifically.

June 3d. Lord CHANCELLOR [LOUGHBOROUGH]. The question arises upon the leasehold property at Newark; which by the articles made upon the marriage was to be settled in the same manner as the freehold estates, as far as the rules of law would permit.

I mean to be extremely short in stating my opinion; which is decidedly, that in cases of marriage articles, where leasehold property is to be the subject of a settlement of freehold estate, and the limitations of the freehold go to all the sons in succession, the settlement to be made of the leasehold is to be analogous to that of the freehold; so that no child born, and not attaining the age of twenty-one, shall by his birth attain a vested interest to transmit it to his representatives, and thereby defeat the ulterior objects

(1) *Jones v. Morgan*, 1 Bro. C. C. 206.

(2) See *Garth v. Baldwin*, 2 Ves. 646; *Wright v. Pearson*, Amb. 358; *Jones v. Morgan*, 1 Bro. C. C. 206, and Fearn's Cont. Rem. 4th edit. 166, &c.

of the articles ; which are not decidedly in favor of one son ; but equally extended to every son ; and that I take from all the course of the cases to be the settled rule and established practice. Sir Joseph Jekyll in **Stanley v. Leigh*, I dare say [*398] after great consideration, lays it down, that he understood at that time that to be the course, where there were articles for a settlement of leasehold estate. Nothing is more reasonable ; for by adhering literally and verbally to the words the estate in the deed executed would defeat the view of the parties and frustrate their purpose in making the settlement. Admitting in the argument, that if the subject of the articles was freehold estate, and the articles were so drawn as to give an estate to the heirs of the body of the father, it would be impossible, that he should be tenant in tail, but he must be reduced to an estate for life ; in parity of reasoning it is impossible in this case to give a vested interest to a son upon his birth. The reason, I discuss the less upon this, is, that the argument referred to Mr. Fearn's second volume, p. 482 ; where all the cases are so extremely well stated, and in so satisfactory a manner, that I cannot do better than refer to it (a).

I had a little doubt upon the argument, "why do not you go farther ; for you do not carry on the analogy strictly ; for if you vest it in a child attaining the age of twenty-one, the limitation of the freehold estate would endure much farther." I find, that has been done in a private act of parliament : but I hardly think myself warranted to follow that. That was a private act to sell some estates and purchase others ; and in the estates to be purchased there was a considerable quantity of leasehold property, extremely convenient to the occupation of the freehold, because it consisted of tithes over freehold estates ; and the Judges admitted a clause, that the leasehold estates were to go to the persons entitled to the freehold, until some person entitled to an estate-tail in the freehold shall have acquired the fee-simple. I think myself not warranted to go to that extent : but I think, there is no objection to making the limitation, as it was intended in the act of parliament, that was prepared to settle the Newark property ; that no person shall be entitled to the absolute property, unless he shall attain the age of twenty-one years, or die under that age, leaving issue male (1).

1. THAT it is impossible to direct the succession of leasehold or other personality, so as to go concurrently with the descent of freehold, see, *ante*, the note to *Fordyce v. Ford*, 2 V. 536.

2. The *dictum* in the report of the proceedings on appeal in the principal case,

(a) On a former occasion, Lord Thurlow referred with praise to the labors of Mr. Fearn. See, *ante*, note (a) *Perry v. Phelps*, 1 V. 256.

(1) See *post*, the appeal from this decree, *The Countess of Lincoln v. The Duke of Newcastle*, vol. xii. 217. The decree, declaring, that the covenant to convey the leasehold manor, &c. ought to be established, and the said leasehold manor, &c. ought to be settled, subject to the several annuities, charges, &c. affecting the same, in trust for the Duke of Newcastle, his executors, administrators and assigns ; but if he should die under the age of twenty-one without leaving issue male of his body, living at the time of his death, then upon a similar

ascribed to Lord Eldon, namely, that "there is no difference in the execution of an executory trust created by will, and of a covenant in marriage articles," has been explained by his Lordship himself, as not intended to convey the slightest intimation, that there was no difference between marriage articles which are to be carried into execution according to the intention, and trusts executed. *Jervoise v. The Duke of Northumberland*, 1 Jac. & Walk. 571. Where a trust is executory, Sir William Grant professed to see no other difference, whether such executory trust was created by marriage articles or by a will, except that the object and purpose of the former furnish an indication of intention, which may be wanting in the latter. *Blackburn v. Stables*, 2 Ves. & Bea. 370. Sir John Leach, also, has recognized this distinction. *Lord Deerhurst v. The Duke of St. Albans*, 5 Mad. 260. But, of course, a will may afford as clear an intention to make provision for the children of a marriage, as a settlement could do; and, in such case, the Court is at liberty to use the same latitude in the construction of the will, as it is accustomed to do on executory articles. *Synge v. Hales*, 1 Ball & Beat. 508.

3. Another distinction, besides that already adverted to, between marriage articles and wills, is this:—all the parties to the former are to be looked upon as purchasers for their issue; *Parkes v. White*, 11 Ves. 235; and, as such, their intention is to be effectuated, if it can consistently be done; but, in the latter case, it is not the intent of the parties whose issue are to take, but the intention of the testator only which is to be taken into account; the consideration of marriage, by virtue of which the issue might be deemed purchasers, has here no place. *Stratford v. Powell*, 1 Ball & Beat. 25.

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THOMAS v. FRAZER.

[1797, JUNE 19.]

JOINT bond considered as joint and several. (a)

JOHN EWER and his son Walter Ewer, merchants in partnership, entered into the following bond, dated the 1st of May 1789:

trust for his brother, with several similar limitations over, was varied by omitting all the limitations after that to the Duke of Newcastle; who had then attained the age of twenty-one. *Carr v. Lord Erroll*, vol. xiv. 478; *Burrell v. Crutchley*, xv. 544; *Browncker v. Bagot*, xix. 574; 2 Mer. 271; *Lord Deerhurst v. The Duke of St. Albans*, 5 Madd. 232; *Mogg v. Mogg*, 1 Mer. 654.

(a) It seems to be settled that every contract for a joint loan is in Equity to be deemed, as to the parties borrowing, a joint and several contract, whether the transaction be of a mercantile nature or not; for in every such case it may fairly be presumed to be the intention of the parties, that the creditor shall have the several, as well as the joint, security of all the borrowers. 2 Story, Eq. Jur. § 162; *Thorpe v. Jackson*, 2 Younge & C. 553; *Wilkinson v. Henderson*, 1 Mylne & K. 582. Equality of responsibility among the obligors is effected only by making the bond several, as well as joint; for otherwise, in case of the death of one of the obligors, the survivor or survivors only would be liable at law. *Weaver v. Shryock*, 6 S. & R. 262; *Ex parte Kendall*, 17 Ves. 525. But where the inference of a joint original liability is repelled, Equity will not interfere; for in such a case, there is no ground to presume any mistake. *Sumner v. Powell*, 2 Meriv. 35; *Cowell v. Sykes*, 2 Russ. 191; *Hunt v. Rousmanere*, 8 Wheat. 212; S. C. 1 Peters, Sup. C. 16. Nor will it extend a bond against a mere surety, or against a party to a covenant of indemnity for the acts of third persons. *Ibid.* *Harri-son v. Field*, 2 Wash. 136; *Ward v. Webber*, 1 Wash. 274. But even against a surety it will interfere in case of clear mistake. *Wiser v. Blackley*, 1 Johns. Ch. 607; *Berg v. Radcliffe*, 6 Johns. Ch. 302; *Rawstone v. Parr*, 3 Russell, 424; S. C. Ib. 539. But see *Smith v. Martin*, 4 Dessaus. 148. See also Stephens, Nisi Prius, 2403.

"Know all men by these presents that we Walter Ewer and John Ewer of London merchants are held and firmly bound to John Brassier Esq. of Shipston House near Hounslow in the penal sum of 12,200*l.* of good and lawful money of Great Britain to be paid to the said John Brassier or his certain attorney executors administrators or assigns for which payment to be well and faithfully made we bind ourselves our heirs executors and administrators and every one of them firmly by these presents," &c.

"The condition of this obligation is such that if the above-bounden Walter Ewer and John Ewer their heirs executors or administrators or any of them shall and do well and truly pay," &c.

In 1792 John Ewer died. Walter Ewer continued to carry on the business after the death of his father till 1795; when a commission of bankruptcy issued against him. The obligee being dead the bill was filed by his executrix, charging, that Brassier agreed to lend to the testator John Ewer and the Defendant Walter Ewer, and they agreed to borrow of him, the said sum of 6100*l.* and it was understood between them, that the bond to be given by the said testator and Defendant for the said sum was to be a common bond in the usual form from two persons, and that the said testator John Ewer and the Defendant Walter Ewer and their respective heirs, executors and administrators, were to be equally answerable for the said sum and the interest; and that severally as well as jointly; and that if the bond had been prepared and filled up by any person competently skilled in the law, it would have been made a joint and several bond; and that it was owing to the want of skill in the Defendant Walter Ewer in preparing bonds, that the said bond was filled up in the manner, in which it was; and it was also for want of knowledge in Brassier as to the manner, in which a bond from two persons should be filled up, that he accepted the said bond in the form aforesaid.

The bill prayed, that it may be declared, that the said [* 400] bond ought in Equity to be considered as a joint and several bond, and that the Plaintiff is entitled to be paid the said bond debt and the interest thereof out of the personal and real assets of the testator John Ewer; and that an account may taken, &c.

The Defendant Walter Ewer, surviving executor of his father, by his answer stated, that the sum of 6100*l.*, for which the bond was given, was the balance of an account current between the said John Brassier and John and Walter Ewer, commencing in 1785. On the 31st of December 1787, John and Walter Ewer gave to John Brassier a promissory note payable on demand for 1500*l.*: but the balance increasing to the sum of 6100*l.* and upwards, Brassier requested them to give him a bond for such balance. The Defendant admitted, that the bond was in the common printed form, and was filled up by him without the assistance of or application to any professional man; he conceiving the same to be right, and according to the manner, in which the debt was contracted; and he believes it might be the meaning and intention of Brassier and of the Defendant

and John Ewer, that the bond should be in the common and usual form of bonds from two persons: but the Defendant, and, as he believes, the said John Ewer and John Brassier, did not know the distinction between a joint bond and a joint and several bond.

Solicitor General [Sir John Mitford] and Mr. *Hollist*, for the Plaintiff. The bond could not be a farther security, unless it was joint and several. In the bankruptcy of *Bate* and *Henckell*, 23d of June 1783, a bond exactly in the same words was held joint and several; and the same order was made in the bankruptcy of *Freeman* and *Grace*, 1st of April 1795 (1). In both the bond was filled up by the parties themselves.

(1) The petition in the bankruptcy of *Bate* and *Henckell* stated, that the petitioner had advanced to *Bate* several sums, to the amount of 1500*l.* upon his promissory notes: and on the 8th of March, 1776, the petitioner advanced to *Bate* the farther sum of 500*l.* and received a bond of that date; whereby *Bate* and *Henckell* became bound to him for payment of 2000*l.* with interest. The bond being brought by *Bate* ready filled up was received by the petitioner without consulting any person or even examining it; the petitioner from the confidence, he had in *Bate*, taking it for granted, that it was the common and usual form; and that the separate property of *Bate* was bound thereby: but upon inspecting the bond since the bankruptcy it was discovered, that *Henckell*, who filled up the bond, had omitted to make himself and *Bate* separately bound. Such [*410] omission was entirely unknown to the petitioner, when the *bond was delivered: on the contrary he was given to understand, that it was made out in the common and usual form; and that *Bate* was separately bound: otherwise the petitioner would not have accepted the same; for the money was advanced upon the credit of *Bate* alone, not of *Henckell*; whom the petitioner hardly knew; and if the bankrupts were interrogated, they must acknowledge, that it was intended, they should be severally as well as jointly bound; and that the said omission was by mistake and entirely owing to the want of knowledge of *Henckell* of the proper and usual form of filling up bonds entered into by two or more obligors. The petitioner therefore prayed, that he might be admitted a creditor upon the separate estate of *Bate*; and it was so ordered.

In the bankruptcy of *Freeman* and *Grace* the petition stated, that John and Joseph Freeman of London in consideration of the business of their father being given up to them undertook to be answerable for 2800*l.* due by their father on his promissory note to John Freeman of Lutterworth; and which the latter assented to their keeping in their trade; and as a security for the said sum the following bond, dated the 25th of March, 1771, was delivered to John Freeman of Lutterworth: "Know all men by these presents, that John and Joseph Freeman, jun. warehouse-men of Devonshire Square, are held and firmly bound to John Freeman of Lutterworth in Leicestershire in the sum of 5600*l.* of good and lawful money of Great Britain to be paid to the said John Freeman or his certain attorney executors administrators or assigns: for which payment to be well and faithfully made we bind ourselves heirs executors or administrators and every of them," &c. "The condition of this obligation is such that if the above-bounden John and Joseph Freeman, jun. their heirs executors or administrators shall and do well and truly pay," &c. The bond was filled up by the said Joseph Freeman, the bankrupt, without the assistance of or application to any professional man; and was through mistake and his ignorance in matters of that nature filled up in the form aforesaid; but it was the meaning and intention of the obligors, that the same should bind them and each of them in the usual way of bonds from two persons; and the said obligors always conceived, that the said bond had that effect. In 1777, *Grace* was taken into the partnership: and the said sum of 2800*l.* was carried into the new partnership. John Freeman of Devonshire Square died in 1784; having by his will appointed Joseph Freeman residuary legatee and executor. Afterwards John Freeman of Lutterworth died; having by his will made in 1774, appointed John and Joseph Freeman of Devonshire Square execu-

Attorney General [Sir John Scott], for the Defendants. A joint bond has been held joint and several upon circumstances; particularly in bankruptcy: but I do not recollect any case, that goes the length of this. *Bishop v. Church*, 2 Ves. 100, 371, was upon circumstances. The admission of the Defendant Walter Ewer does not bring this up to the cases cited.

LORD CHANCELLOR [LOUGHBOROUGH]. The Defendant Ewer gives an account of the general ignorance of them all: but he admits the intention * to have been, that the bond should [*402] be in the common and usual form of bonds from two persons: exactly the same as the admission in the other cases. I do not see, how the bond was better than the note, unless it was joint and several. A partnership note from persons in trade would have all the effect, that a joint bond would have.

Declare, that the bond ought to be taken as a joint and several bond: and refer it to the Master to take an account, &c. (1).

A SEVERAL bond may be ordered, by a Court of Equity, to be delivered up, when the intention was, that the bond should be joint; and there has been no *laches*, on the part of the obligor, after discovery of the mistake; nor any acts done by him, waiving the objection. *Underhill v. Horwood*, 10 Ves. 226; *Gray v. Chinwell*, 9 Ves. 126. So, on the other hand, a joint bond may be reformed, and treated as joint and several, if such was the intention of the parties. *Burn v. Burn*, 3 Ves. 573; *Ex parte Halkett*, 19 Ves. 475; *Ex parte Symonds*, 1 Cox, 200.

tors. In 1790 a commission of bankruptcy issued against Joseph Freeman and Grace.

The petition was presented by persons claiming two legacies of 2000*l.* and 800*l.* under the will of John Freeman of Lutterworth; to answer which legacies Joseph Freeman, the surviving executor, had retained the said bond debt. One of the petitioners was also residuary legatee. The object of the petition was to be admitted to prove under the commission the sum of 2800*l.* and the interest due thereon from the 8th of March, 1785, to which time it had been paid to the testator John Freeman of Lutterworth; and that if the dividends arising out of the estate of the bankrupts in respect of the said sum of 2800*l.* and the interest should be insufficient to discharge the whole thereof, then that the amount of the dividends to be received on the debt to be proved under the commission in respect of the estate of John Freeman of Devonshire Square, one of the obligors in the said bond possessed by Joseph Freeman the bankrupt, should be applied towards payment of such deficiency; and it was so ordered.

(1) *Simpson v. Vaughan*, 2 Atk. 30. *Post*, in *Burn v. Burn*, 573, this equity prevailed against creditors; vol. ix. 125, x. 225, 8; xix. 475; *Ball v. Storie*, 1 Sim. & Stu. 210. See *Card v. Jaffray*, 2 Sch. & Lef. 374; *Sunner v. Powell*, 2 Mer. 30.

LORD WALPOLE v. LORD ORFORD.

[1797, JUNE 21, 23, 26.]

TESTATOR by codicil in 1776 reciting, that he had devised his real estate by his last will, dated 25th November, 1752, charged his real estates with his debts, and legacies given by the codicil, and appointed executors; the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil; stating, that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator by the death of the other party was bound, if not in law, in honor; and did not mean to revoke the will of 1756 and revive that of 1752; and praying, that the will of 1756 and the codicil might be established, the trusts carried into execution, and the legacy paid: upon an issue directed the will of 1752 was established; evidence of mistake being rejected: on farther directions the Plaintiffs relied on the agreement, and offered evidence in support of it: the bill was dismissed: the Lord Chancellor being of opinion, that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer; that the evidence ought not to be received: and that upon the evidence the agreement was uncertain and unfair, and therefore not to be executed. (a)

SIR ROBERT WALPOLE, the first Earl of Orford, had three sons: Robert, who upon his father's death succeeded to the title, Sir Edward Walpole, and Horatio Walpole. He had two daughters: Mary and Maria. The former in 1723 married George afterwards Lord Cholmondeley, and died in 1732, leaving Lord Malpas her

(a) It seems that the judgment in the present case turned chiefly on the uncertainty, and, in some sense, the unfairness of the alleged compact. It does not establish the legality of mutual wills, which it has been said are unknown to the testamentary law of England. See 1 Williams, Executors, 9, 71; *Hobson v. Blackburn*, 1 Add. 277. One ground of objection to such an instrument as testamentary, is that it is irrevocable, for it is of the essence of a will that it is ambulatory, and may be revoked at any time prior to the death of the testator; *omne testamentum morte consummatum est, et voluntas est ambulatoria usque ad extremum vitæ exitum*. Ibid. But it would seem that such a will may be enforced in Equity as a compact; *Dufour v. Pereira*, 1 Dick. 419; see the judgment in the latter case also reported 2 Hargrave, Jurid. Arg. 272; 2 Harg. Jurisconsult Exercitations, 101, where will be found Mr. Hargrave's remarks on the present case. See also *Eard v. Middleton*, 1 Dessaus. 116, which is a case somewhat similar to the present; but the agreement not being reduced to writing, and the defendant insisting in his answer, on the Statute of Frauds, and the evidence not being satisfactory, the bill was dismissed with costs. In another case, an agreement by a husband to make by will a sufficient provision for his wife, in consequence of her stipulating before marriage, by agreement in writing, to renounce all claim upon his estate, was enforced against his executors; it being held that the party by such agreement had renounced the absolute power of disposing of his estate with which he was clothed by law. *Rivers v. Rivers*, 3 Dessaus. 190. So it seems an agreement between the children of a family, made during the life time of their father, to divide his estate equally among them at his death, notwithstanding any distribution of the same he might make, would be enforced in Equity, if clearly proved, and if it did not infringe the Statute of Frauds. *Nelson v. Nelson*, 1 Wash. 136.

The present case is also cited as an authority to show that relief, inconsistent with the case stated in the bill, cannot be given under the general prayer. 2 Maddock Ch. 171. See also Story, Eq. Pl. § 42; *Jones v. Parish of Montgomery*, 3 Swanst. 208; *Walker v. Devereaux*, 4 Paige, 229; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Sheppard v. Starke*, 3 Munf. 29.

It is deemed proper to preserve in these pages the prefatory note with which

eldest son, father of the present Lord Cholmondeley. His other daughter Maria married Charles Churchill. Robert the second Earl of Orford died, leaving an only son, George the third Earl.

Horatio, afterwards created Baron Walpole of Woolterton, brother of the first Earl of Orford, had four sons: Horatio, Thomas, Richard, and Robert.

Mr. Hargrave has introduced the remarks already referred to on this curious case :

"The following professional paper is connected with the great cause in Chancery between the present Lord Walpole and the present Earl of Cholmondeley. Both branches of that cause are very ably reported. The branch at law is in 7 Durnf. and East 138. The equity branch is in 3 Ves. Jun. 402. It is only to the latter branch, that the following paper relates. The cause, so far as the subject of the following paper requires an introduction, may be thus explained :

"George the third Walpole Earl of Orford, grandson and heir of that eminent statesman Sir Robert Walpole the first earl, by a will dated 23 November 1752, devised Houghton and the other family estates in Norfolk in such a course of entail, as, in default of issue male from himself and his two uncles Sir Edward Walpole and the late Mr. Horace Walpole, afterwards fourth and last earl, to let in successively the issue male of his father's two sisters Lady Malpas the present Earl of Cholmondeley's grandmother and Lady Mary Churchill, and the issue male of his grandfather Sir Robert Walpole's two sisters Lady Townsend and Mrs. Hammond, in preference to his great uncle Horace the late Lord Walpole and his issue male. But afterwards, by a will dated 31 March 1756, George Earl of Orford devised the same estates in a course of entail, which, on failure of issue of himself and his uncles Sir Edward Walpole and Horace Walpole, postponed the issue male of Lady Malpas, Lady Mary Churchill, Lady Townsend, and Mrs. Hammond, in favor of his great uncle Lord Walpole and his male issue. This new arrangement was made by Earl George, in concert with his uncle Horace Lord Walpole: and the latter, on the very same day, in part-repeal of a will he had already made, executed a codicil devising his own estates in strict settlement, on failure of issue male from him, to Earl George and his issue male, with remainders successively to his uncles Sir Edward and Horace Walpole and their issue male, and to the issue male of Lady Malpas, Lady Mary Churchill, Lady Townsend, and Mrs. Hammond, exactly according to the plan and language of the entail created by Earl George's will of the same date: and Horace Lord Walpole dying about nine months afterwards, this codicil, so preferring the issue male of his elder brother Sir Robert Walpole and of Sir Robert's daughters and sisters to his own daughters, who were several in number, and to their issue, took effect. Almost twenty-one years after the will of March 1756, namely, on the 4th of December 1776, Earl George made a codicil. It was quite consistent with being a supplement to the last of his two wills, except that it recited his having made his last will dated 25 Nov. 1752, which was the date of the first of them. But on his death in Dec. 1791, he dying a bachelor; and his uncle Sir Edward Walpole being previously dead without issue; and his uncle Horace, who succeeded to the earldom, being a bachelor and greatly advanced in years, it became important to know, — whether the recital in Earl George's codicil, of his having made his *last* will dated 25 Nov. 1752, should operate as a revival of the will so dated, and consequently as a revocation of the subsequent one of 31 March 1756; or should be considered as a mere error of date in the reference. If the recital of the codicil was a revocation of the last of the two wills, the present Earl of Cholmondeley, subject to the life interest of Horace Earl of Orford, and to remainders to his first and other sons successively in tail male, which soon became impossible by his death without having married, was entitled to the splendid house of Houghton in Norfolk and the other ancient family estates in that county. If the recital was a mere error in stating the date, then the last of the two wills was unhurt, and so the present Lord Walpole was entitled to the same devised Norfolk estates. To adjust this point, whether the codicil had revoked the will of 1756, and revived the will of 1752, Lord Walpole filed a bill in chancery against the Earl of Cholmondeley and others; the chief object of which was to have the will

The first Earl of Orford had also two sisters: Dorothy and Susannah. The former married Viscount Townshend, and left issue four sons: George, Augustus, Horatio, and Edward. Susannah married Anthony Hammond: and they left issue, three sons: Richard, Robert, and Horatio.

of 1756 established with the codicil of 1776 as a codicil to it. Upon the hearing of this cause in November 1795, the point being a *legal* one, Lord Chancellor Loughborough for trial of it directed two issues to the Court of common pleas. The result was a verdict in favor of Lord Cholmondeley. But the record of the judgment founded on this verdict, included a bill of exceptions by Lord Walpole, in respect that the court had refused to admit some evidence offered on his lordship's part, to show George Earl of Orford's not intending by his codicil to revoke the will of 1756; though the evidence was to obviate a doubt, which arose not from the codicil in itself, but from a circumstance *external*, namely, from the production of two wills, of which one agreed with the recital of the codicil in being *last*, and the other in *literal date*. To have this point as to the refusal of evidence of explanation farther argued under the bill of exceptions, the case was carried to the king's bench by error. But the judges of that court concurred with the common pleas in holding the evidence offered inadmissible.

"In this stage of the business, and when the equity cause was set down before Lord Loughborough for farther direction, without any intention of farther contesting the matter against Lord Cholmondeley, the author of the following paper was accidentally spoken to by the respectable gentleman, who was Lord Walpole's solicitor, and who had distinguished himself in his usual manner, both by his talents and his industry. What passed at first was a mere conversation. However, enough passed from the author, to show that, according to his notion, though Lord Walpole had lost his cause at law, there was a point open to him in equity, which possibly might equally serve his purpose. The idea suggested was, that the circumstances of George Earl of Orford's will of 1756, and of the late Lord Walpole's codicil of the same date, seemed to be such, as to lead to consider the two testators as having acted by *compact*, in other words as making *mutual wills*: and that the late Lord Walpole's death having rendered his part of the compact irrevocable, Earl George's part should in equity be deemed equally so. It occurred also to the author, that he was possessed of the copy of a judgment by the late Lord Camden, whilst he held the great seal, taken from his lordship's own note-book, in a case of mutual wills, which perhaps might be applicable: and upon inspection of the judgment, it actually appeared to be a case, at least furnishing principles favorable to maintaining Earl George's will of 1756, on the ground of compact. The solicitor of Lord Walpole was struck with the manner of thus raising an equity point for his lordship; more especially after seeing Lord Camden's judgment in the case of mutual wills before him. Under these circumstances, it was thought fit to consult the author professionally on behalf of Lord Walpole; and a case was laid before the author, in order to have his impressions on the point of equity. His opinion was given in the course of about nine or ten days; and is contained in the following paper, with no other difference than the correction of some error of expression, which escaped from the author in the hurry of writing, but which was not however in the least material to the argumentative parts of the paper. After his having written the opinion, and attended a consultation with Mr. Solicitor General Mitford and Mr. Mansfield, the two senior counsel for Lord Walpole in equity, the author was not thought a necessary person to be any farther resorted to in the business. But the equity point, which he first accidentally made, and afterwards laboriously considered, was regularly argued by the solicitor general, Mr. Mansfield, Mr. Graham, and Mr. Alexander for Lord Walpole. The judgment of the lord chancellor was against Lord Walpole on the point: and the clearness, with which it is reported in Mr. Vesey's third volume of Chancery Cases, is one of many proofs of his happy manner of recording judicial eloquence of the highest class. The chief ground of the lord chancellor's decision seems to have been, that the compact between the two testators was too *vague* and *uncertain* to be enforceable by a court of justice, and therefore was only fit to operate as an *honorary* engagement. How this objection

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The first Earl of Orford had also two sisters: Dorothy and Susannah. The former married Viscount Townshend, and left issue four sons: George, Augustus, Horatio, and Edward. Susannah married Anthony Hammond: and they left issue, three sons: Richard, Robert, and Horatio.

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the other legatees of Lord Orford, and also claiming as tenant in tail expectant upon the death of his father, against Lord Cholmondeley, Lord Orford, and the executors of George Earl of Orford; praying, that the will of George, late Earl of Orford, dated the 31st of March, 1756, and his codicil, dated the 4th of December, 1776, as a codicil to the said will, may be established, and the trusts thereof carried into execution; then praying the usual accounts; and that, if the personal estate should not be sufficient for the debts, legacies, &c. the deficiency may be raised from the testator's real estates; and that the Plaintiff Horatio Walpole may be paid his legacy of 10,000*l.* with interest.

The bill stated, that George Earl of Orford and Horatio, afterwards Lord Walpole, his great uncle, about the beginning of the year 1756 agreed with each other to settle the principal parts of their respective estates in the county of Norfolk in such manner, that the said Horatio, afterwards Lord Walpole, and the issue male of his body should take the Orford estates, (except the estates in jointure and those comprised in the mortgage to Walker,) before any of the issue female of the first Lord Orford; and that the issue male of the first Lord Orford should take the estates of the said Horatio Walpole before any of his own issue female: so that upon failure of the issue male of the body either of the said first Earl of Orford or of the said Horatio Walpole, his brother, the estate of that branch of the family, whose issue male should so fail, might go to the issue male of the other branch; and that the two estates might thereafter be enjoyed together. The bill then stated, that in pursuance of the said agreement and in order to carry the same into execution, the will of Lord Orford, dated the 31st of March, 1756,

and the codicil of Horatio, afterwards Lord Walpole, of [* 407] the same date, were prepared and executed; that *Horatio, Lord Walpole, died in 1757 without having revoked his codicil; by means whereof the limitations thereof took effect; and therefore the late Lord Orford was bound and deemed himself bound by the agreement, he had made with the said Horatio Lord Walpole; and if Lord Orford was not in law bound by such agreement, he was in honor bound thereby, and considered himself as bound thereby. The bill charged, that the testator Lord Orford did not by his codicil mean to revive or set up the will of 1752 or in any wise to change or alter the limitations of his estates made by his last will, dated the 31st of March, 1756; but meant only to charge his real estates with the payment of his debts and legacies, and to dispose of his personal estate, and to appoint executors; and that the date of his last will and testament was mistakenly inserted in the said codicil; and that the said codicil was meant to be and is in fact by the said testator declared to be a codicil to his last will; and that notwithstanding the mistake of a date in the recital of the said codicil the testator in fact meant thereby to refer to his last will and testament; which last will and testament bore date the 31st of March, 1756; the instrument bearing date the 25th of Novem-

ber, 1752, having been revoked by the said will of the 31st of March, 1756.

Lord Cholmondeley by his answer stated, that he did not know or believe, that Lord Orford did at any time become bound or consider himself bound in law or equity or in point of honor to the performance of any agreement mentioned in the bill, or of any agreement whatever, in relation to the disposition of all or any part of his estates in favor of the male issue of Horatio Lord Walpole or of any person or persons whatever to the prejudice of all or any person or persons named in the will of 1752.

All the instruments were proved; and it appeared, that Lord Orford's will of the 31st March, 1756, and Lord Walpole's codicil of the same date, were attested by the same witnesses. The Plaintiffs offered evidence, that both those instruments were laid before the same Counsel, and were executed at the house of the Plaintiff Lord Walpole at the same time; and that at the time of execution Lord Orford said to Richard Capper, Esq. one of the subscribing witnesses, that his uncle and he had made reciprocal limitations in the said instruments in favor of each of their families in case of failure of issue of either of them; they also offered letters of the *testator Lord Orford and parol evidence to prove [*408] Lord Orford's friendship and regard for the Woolterton family, and that he was not intimate with the family of Lord Cholmondeley.

The evidence offered by the Defendants was to the following effect:

Charles Lucas, who was employed by the testator Lord Orford as solicitor, deposed to several conversations between him and the testator, in which the latter showed great anxiety that his estate should go to the right heirs.

Carlos Cony, steward of the testator Lord Orford, deposed, that in 1776 the said testator directed the deponent to prepare a codicil to his will. The deponent saying, it would be proper for him to have the will, the testator said, his will was in the hands of Mr. Moone; and he gave the deponent a letter to Mr. Moone directing him to deliver his will to the deponent. In consequence of that letter the will of the 25th of November, 1752, was delivered to the deponent in May 1776 by Moone. The will remained in the deponent's possession for several months. The deponent having prepared the codicil attended the testator with it at his house at Eriswell in November 1776 or January 1777. Blanks were left for the names of the executors and trustees and for legacies by the testator's directions. The testator read or appeared to read the codicil. The blanks were filled up in the testator's hand-writing. At the time of giving instructions for the codicil the testator did not inform the deponent, that he meant to revoke any disposition he had made by his will of his real estate, or to change any of the limitations or to alter the line of succession, in which the same would go, as his will then stood; nor did he give any instructions to make any alteration in the limitations

of his real estates farther than to make them subject to the payment of his debts, legacies and funeral expenses. During the testator's second derangement the deponent went to Eriswell, and asked Mrs. Tuck for the testator's will and codicil; and he annexed them together and sealed them up: he believed the will then delivered to him was the will, he had received from Moone.

William Moone confirmed the evidence of Cony, as far as it related to the delivery to him of the will of 1752; and deposed [*409] ed, * that the said will was committed to the custody of the deponent immediately after it was executed; and it remained in his custody above twenty years.

Richard Gardiner deposed, that the testator being at his house at Eriswell shortly before his death said to the deponent; "I desire you will take charge of my papers of my will in this house; as upon those depend the succession of my family to my property." The testator then said, he had named executors, and had given and bequeathed 10,000*l.* to Colonel Walpole, and 5000*l.* to Mrs. Tuck, (which he said was lapsed by her death,) and that he had also left something to his servants. A few days afterwards the testator had a fall from his horse; and being confined to his bed at Brandon, where the accident happened, and not likely to return to Eriswell for some time, the deponent went to Eriswell to secure the testator's will and codicil; which he thought unsafe in the common drawer of a bureau; and he brought away the parcel, which contained the said will and codicil; and deposited the same in the iron chest in the steward's office at Houghton; where they were found at the death of the testator. The instruments so deposited were the will of 1752 and the codicil of 1776.

Daniel Potter deposed, that about two years before the execution of the codicil the testator became insane, and continued so about a year; and some few months after the execution of the codicil he again became insane; and continued so for some months.

By an order made upon the hearing of this cause on the 26th of November 1795, and a subsequent order made on the 6th of February 1796, the Lord Chancellor directed the following issues to the Court of Common Pleas: 1st. Whether George, late Earl of Orford, devised to the Defendant, the Earl of Cholmondeley, an estate in tail male in remainder expectant immediately after the death of the Defendant the Earl of Orford and failure of sons or a son of his body and of issue male of the bodies or body of such sons or son; 2dly, Whether the said testator devised an estate for life in remainder to the Plaintiff Lord Walpole expectant immediately after the death of the said Defendant the Earl of Orford and failure [*410] ure* of sons or a son of his body and of issue male of the bodies or body of such sons or son.

In Easter Term, 1796, the first issue came on to be tried at the bar of the Court of Common Pleas; when the Court being of opinion, that the evidence offered on the part of Lord Walpole, the Defendant in that issue, to show, the testator Lord Orford did not in-

tend by the codicil of 1776 to revoke the will of 1756 and set up the will of 1752, could not be received, a bill of exceptions was tendered, which the Court allowed. A verdict was found for the Plaintiff Lord Cholmondeley; and the other issue was withdrawn.

In Hilary Term, 1797, the exceptions were argued in the Court of King's Bench; which Court concurred in opinion with the Court of Common Pleas (1).

Before the cause came on upon the equity reserved, the Defendant Lord Orford died without issue. The question made for the Plaintiffs, when the cause came on upon the equity reserved was, whether, taking the codicil to be a revocation of the will of 1756, it was not executed in fraud of that contract, in pursuance of which the Plaintiff contended that will was executed; to prove which they offered to read the evidence of Mr. Capper.

Attorney General [Sir John Scott], for the Defendant Lord Cholmondeley, objected to the evidence.

Solicitor General [Sir John Mitford], for the Plaintiffs. *Rockwood v. Rockwood*, Cro. Eliz. 163. 1 Leon. 192. *Thynn v. Thynn*, 1 Vern. 296. *Devenish v. Baynes*, Pre. Ch. 3. *Chamberlaine v. Chamberlaine*, 2 Freem. 34; 2 Eq. Ca. Ab. 43, cited Pre. Ch. 3. Here is a promise made in consideration of a will made in a particular manner; which took effect. The principle is considered by Lord Nottingham as established. In *Berenger v. Berenger*, Lord Nottingham's mss. the testator's son promised to pay his sister a sum of money at the end of three years, and to support her in the mean time. That was not a case upon a will, but upon forbearing to make a disposition by will, which would have the effect of making a provision for a daughter out of an *estate, which [*411] was suffered to descend to the son. *Reech v. Kenne-gal*, 1 Ves. 123; 1 Wills. 227; Amb. 67 (2).

Attorney General [Sir John Scott], for the Defendant. The bill considers the land directly and specifically bound according to the will of 1756. They now admit, that will could be defeated by a codicil by bringing charges upon it to the amount of the whole value. If the estate was bound, it could no more be affected by codicil than by act *inter vivos*. The case, they now offer to prove, it is not within the scope of their bill to be at liberty to prove: if it was, parol evidence cannot be admitted, where two writings do not refer upon the face of them to each other, to show, they contain a binding agreement upon the land. The Statute of Frauds is at an end, if under the name of an agreement a thing may be made a devise, or under the name of a devise an agreement, which is not either according to that Statute. As to the cases, where upon the head of fraud evidence has been admitted, the bill must allege a fraud practised, and that it was done in consequence of that fraud. *Devenish v. Baynes*, the only case, in which land was bound, turned upon the

(1) 7 Term. Rep. B. R. 138.

(2) See more cases of this nature in the note, *ante*, p. 38, 9, to *Pym v. Blackburn*.

custom of the country ; by which the estate could be created by parol ; therefore they let in evidence. In other cases it was personal estate ; and the Court studiously decreed, that the individual, who had defrauded the testator, should out of *his* funds make good the promise ; and reserved the question, whether he could come upon the assets, which the testator had intended to affect. In *Reech v. Kennegal* Lord Hardwicke was very cautious as to the evidence ; and went upon the denial in the answer not being sufficient.

Lord CHANCELLOR [LOUGHBOROUGH]. How am I to comply with the prayer of this bill ? I must declare, that the devisees taking under the codicil of 1776 shall be trustees for the persons taking under the will of 1756. Then I cannot possibly receive parol evidence. There is another difficulty, not applying to the point of evidence : how can I make that decree upon this bill ; which desires me to give effect to the codicil ; for the Court of law has told me the effect of the codicil ? It has said, the will of 1756 cannot be incorporated into the will of 1776. According to the verdict I can only execute the will of 1776, containing in it the will of 1752. It comes back strongly to the question of evidence. The Court of Law [* 412] has told me, that the will of 1756 is gone. You now * want upon a stated case of contract to make the devisee under the will of 1776 a trustee ; (I should direct him to convey, if the contract is good), and you attempt to do that by parol testimony.

For the Plaintiffs. The evidence ought to be read upon the ground, that takes every case out of the Statute : a contract performed on one side in a manner, that makes it irrevocable.

The evidence was read *de bene esse*.

Solicitor General, [Sir John Mitford], Mr. Mansfield, Mr. Graham, and Mr. Alexander, for the Plaintiffs. No proposition is better settled than that a contract to leave by will is good : *Goilmere v. Battison*, 1 Vern. 48. This is a contract to make mutual wills. A case of that kind and very similar to this was decided by Lord Camden in favor of such an agreement ; *Dufour v. Pereira* in Chancery 18th July, 1769. We read the notes, from which Lord Camden pronounced his judgment. His Lordship referred to the cases, that have been cited for admitting the evidence ; which tend strongly to confirm his opinion ; and though there were in that case circumstances of acquiescence by proving the will and receiving the legacy under it, the judgment was pronounced upon the other ground. It may be objected, that this is a contract in its nature revocable. It is not revocable at all times, but only during the joint lives with notice ; and after the death of either it becomes irrevocable. Lord Camden observes upon that, that when an instrument of this nature is executed, and there is any engagement not to revoke it, a covenant for instance, there can be no doubt, the assets would be responsible ; and where it is an engagement of a different description, if from the nature of the transaction an agreement not to revoke must of necessity be implied, it is precisely the same thing. But without authority the Court would reject that construction, which is big with

fraud. Suppose, the consideration had been 50,000*l.* paid down: would there be any doubt of relief? It would be the same, if the consideration had been a deed executed. Then what is the difference between that case and an instrument becoming irrevocable by the acquiescence of Lord Orford. This is not a case of part performance only; though that would do; but here the agreement is executed. The instruments themselves prove the contract; as Lord Camden says in the case before him. Is it by accident, that they are attested * by the same witnesses, executed [*413] upon the same day, and contain the same covenants? As to the form of the bill, it does not specifically pray the relief, we now ask, because we had great reliance on the other point: but the case is stated in the bill: and then the practice is to give the relief under the general prayer, provided there is no surprise on the Defendants, that they lose no evidence, and suffer no inconvenience by it.

Attorney General [Sir John Scott], Mr. Lloyd, and Mr. Stratford, for the Defendants. Under the prayer for general relief the Plaintiffs cannot have a relief, that is inconsistent with the case made by the bill. They adopt this in the bill as an engagement of honor merely; and they go on to claim under the codicil. Nobody claiming under the codicil can dispute the will of 1752, which is now the legal will. It is impossible for them to claim any thing in this Court under the codicil, not admitting the whole effect of it. If they state the codicil as a fraud upon a valid agreement in 1756, they must abandon the codicil. They are driven therefore to give up all the relief prayed as legatees. The bill ought therefore to have been of a totally different nature. It is an invariable rule, that nothing can be introduced into a cause, that is not put in issue.

As to the merits, the circumstances afford no ground for relief. The very nature of the relief breaks in so much upon the security of property, that they are bound to state, what was the contract. If the evidence was admissible, it is not sufficient to prove such a contract in opposition to the circumstances; that Mr. Walpole was a very old man with four sons, a family established so that in all probability the number would not be increased, and who died in the very beginning of the next year; that Lord Orford was a young man, likely to have children, likely to be in a great situation in the world; in a way likely to incur debts; who in fact lived many years. Lord Orford must be supposed to have agreed, that, having wholly set aside daughters and sons of daughters, he should make no provision out of those estates for younger children; that he should make no jointure; and your Lordship must say farther, that he could not contract debts, so as to bind these estates; or if he did, that he would make himself answerable out of other assets to make good to the persons claiming * under the contract all, [*414] that his wife, children, and creditors, should take out of the estates, that were subject of the contract. It must be admitted, he might with notice have got rid of a contract so oppressive and of such gross inequality.

If a person chooses an engagement of honor instead of a legal contract, where is the equity? The Court is to suppose an engagement to leave these estates, not only to the Walpoles and the Cholmondeleys, but to all the others, the Townshends and the Hammonds. If it had been by deed, no professional man would have permitted it to be done without a power of revocation inserted: if by will, it would not be inserted, only because the law gives a power of revocation. Saying, he was not at liberty to revoke without notice, admits that he had power to revoke: then how is it proved, that he could not without notice? That is a most important term in the agreement. I admit, there may be agreements mutually to leave, according to the case before Lord Camden: but your Lordship is bound to see, that you have evidence according to the law of the land, that such a contract was in fact entered into. Lord Camden put it upon this; that that instrument was a contract. He decides it upon the foot of contract. The evidence of Mr. Capper does not come up to the agreement stated in the bill. The declaration, he proves, is, that Lord Orford and Mr. Walpole had made limitations in favor of each of their families in failure of issue of either of them, not in favor of the males of each of their families in exclusion of the females; and that it was done by will; which it was in the power of either to revoke. The circumstances of the will of Lord Orford and the codicil of Mr. Walpole being laid before the same Counsel and made at the same time are too vague for the Court to act upon. Upon the Statute of Frauds I repeat, that there is no case as to land but *Devenish v. Baynes*. At that time the law of the Court was not settled: 2dly, It might be upon the circumstance, that by the custom the legal estate might be created by parol; besides the agreement was distinctly proved in that and every other case. The point there and in *Chamberlaine v. Chamberlaine* was, whether A. by the representation of B. was fraudulently prevented from making that disposition of his property, that he was then in the act of making; and that was also the question in *Olmus v. Lady Waltham*.

[* 415] *In *Goylmer v. Paddiston*, 1 Eq. Ca. Ab. 17. 2 Vent. 353, the agreement was collateral, in consideration of a marriage, which was had in consideration of that agreement.

Reply. Lord Cholmondeley's answer, that he does not know of such agreement, shows, it was in issue. The fact of the contract being established, the Court must determine the extent of it; and the real foundation of the objection must be that the extent of the obligation cannot be drawn by the Court. A considerable degree of uncertainty might have arisen upon the agreement in 1 Eq. Ca. Ab. and 2 Ventris. In *Dufour v. Pereira* (1) suppose, after the mutual wills were executed, either the testator or testatrix had become embarrassed, and had been obliged to part with some of the property; this sort of instrument must be considered as operating only upon

(1) 1 Dick. 419.

what should be left. The only part of the prayer, that can be considered inconsistent, is that the legacies shall take effect. If there is another fund, there is no inconsistency.

LORD CHANCELLOR [LOUGHBOROUGH.] The prayer of this bill is for payment of legacies. The bill is brought by Mr. Walpole, a legatee, on behalf of himself and all other legatees. Lord Walpole joins with the Plaintiff Mr. Walpole, and makes himself co-plaintiff, claiming as devisee of the estate, and for the purpose of having the other funds, which are first applicable, applied in payment of the legacies, in order to have the estate clear. The case made by the bill states a will of 1752, another will of 1756, and a codicil of 1776, by which the legacies are given. The bill insists, that the codicil refers to the will last in date; under which Lord Walpole claims part of the real estates; and as I conceive upon the form of the bill, as an inducement to that conclusion the bill recites an agreement, and reciting the fact of an agreement and the steps, that were taken in pursuance of it, concludes that the testator was bound in honor, not bound in law, not bound in equity, to adopt that will made in pursuance of the agreement to make reciprocal limitations. The agreement appears to be introduced into the bill to that effect only; and in the manner of it not quarrelling with the codicil, the bill affirms Lord Orford's power to devise; and contends, that he had devised by the will of 1756 and the codicil of 1776 in favor of Lord Walpole and the legatee. That question contested by Lord Cholmondeley claiming under the will *of 1752 [*416] has gone to the proper jurisdiction, a Court of Law; and it has been decided, that the only disposition made by testament is comprised in the will of 1752 and the codicil of 1776; which united make but one instrument. The inevitable consequence upon this bill is, that no legatee of Lord Orford can claim against that disposition. The will of 1752 is by necessary conclusion a part of the codicil of 1776. Mr. Walpole therefore is a suitor in this Court upon his own part and in behalf of the legatees; and in that character only he stands before me. Lord Walpole stands before me only in the character of devisee of the estate, and desiring the application of the prior funds, in order to have the estate disencumbered. Lord Walpole's claim as devisee under the will of 1756 has been negatived by the determination at law; then I can only tell him, consistently with the determination at law, that he is no devisee. The Plaintiffs cannot claim by virtue of a will revoked against a subsequent will, that has been established. They cannot insist, that the testator had no right to devise to the whole extent of the will of 1752, claiming under the codicil, a part of the devise; which must be taken together and entire. The prayer is entirely adapted to that case; and it is perfectly of course after the decision at law, what answer I must give to the specific relief: then, whatever latitude the Court takes upon the prayer for general relief, no relief can be given upon it, that is inconsistent with the specific relief prayed, and that does not apply to the case made by the will.

Great stress was laid and very properly laid, upon *Dufour v. Pereira* (1), with the authority of a very ingenious and eloquent opinion of Lord Camden upon general grounds. That case was in most of the circumstances, and certainly in the form of the bill, the very opposite of this. The bill stated an agreement in writing contained in an instrument conceived in the form of a will of persons not conversant in the laws of this kingdom, made before a notary public; an agreement perfectly defined with minuteness upon all cases, that could be supposed to occur. The bill prayed performance; and in consequence of the agreement it was contended, that all the effects, that existed, were specifically bound; and it prayed a transfer of the specific stocks, that were the subjects of it, and not disposed of, according to that mutual agreement. In that bill the two Plaintiffs,

the daughters of the Defendant, did not claim any benefit [*417] whatever under the will of *Mrs. Reyne the grandmother, but against the will made by her and proved as her last will. The mutual will had been proved after the death of Mrs. Reyne: but it was only proved as the will of Mr. Reyne. In the provisions of that testamentary agreement they had made, which is not very common, a substitution of executors. The survivor was to be the executor; and upon the death of the survivor there is a nomination of three persons to come in as a substitution of executors; and one of them, who was alive upon the death of Mrs. Reyne, who had made her will against the mutual will, was admitted to prove it, not as her will, but as the will of Mr. Reyne, as his legal representative. Mrs. Reyne's will was also proved as her will in the Ecclesiastical Court.

In the view of the Court therefore, the mutual will neither was nor by possibility could be considered as the will of Mrs. Reyne. It was considered purely as the will of her husband. There was no probate of it as her will; but on the contrary the will, she made, was proved. Therefore the Court considered it not as her testament, but as a contract with her husband for valuable consideration; under which she acted for sixteen or seventeen years; that she had taken the benefit of it for her whole life. Therefore she had accepted the terms; and had bound herself to the conditions, under which all the property was given by the will of her husband. The will states, that according to the law of this country she had no separate property. All the property was in common between her and her husband. There was stock in the name of each: 4000*l.* was left by Mr. Detudor at her own disposal, not to her separate use. That was stated by the bill as the property of the husband; as it certainly was. The bill states therefore, that all the property, she had enjoyed from the death of the husband, was the property of the husband. The answer does not deny it, or insist, that any property was to her separate use, but only puts it upon this, that upon the death of the husband that property was not bound by his will, be-

cause the stock was not transferred into his own name ; that it was a chose in action not reduced into possession. The effect of the agreement was, that the wife had the enjoyment during life, and limited to that, of all the specific interests : she had a limited power of disposing of part of that property : but all, she had, was upon condition, that she should dispose of her own property, that she might have acquired after his death (and she did increase it,) upon the dispositions of that will. Suppose, she had rejected * instead of proving the will of her husband, and had [*418] property distinct from that subject to the operation of this contract, and an attempt had been made to bind her by it : I do not apprehend, that Lord Camden would have said, that merely by the chance of her surviving, she a *feme covert* would have been bound by the contract with her husband. I was Counsel in that case ; and remember particularly the argument : but I happen to have taken no note of Lord Camden's opinion ; which has been cited by the Solicitor General from a very accurate note. The style of it convinces me, it was perfectly his own. The scope of the argument was, that the whole family was living near Geneva. The Counsel for the Defendant contended, they had acted upon the idea of a foreign law ; and they state, that according to the law of that country the situation of husband and wife is perfectly different from their situation by the law of England ; and with a view to that this engagement was made ; that the husband there had no interest in the property of his wife : her property *de jure* is separated from his ; he has no interest in it, but the administration *stante matrimonio* ; that upon the death of the wife all his interest ceases ; and it goes to the children, or to her relations ; and in the same manner upon the death of the husband his property goes to the children, and if there are no children, to his relations. They also contended, that there is another maxim, that any donation between them *stante matrimonio* is of no avail ; therefore the constant practice was to make mutual wills : but it was also contended, that mutual wills required confirmation by the survivor ; and then it was efficacious. The discussion upon the reasonableness of that law occupied a considerable part of the argument. Lord Camden was very properly of opinion, that he must judge according to the law of England, where they had long resided ; and taking it to be very advantageous to the surviving party he determined, that she was bound ; and that her husband's will must rule her's : she having enjoyed all the benefit ; and the will being perfectly defined. It was a most minute, distinct and particular, engagement to each other what shall be done after the death of each and of the survivor. It goes even to the specification of what legacies they might give, and of the disposition of plate, watches, jewels and trinkets. Some legacies are to be paid upon the first death : others upon that of the survivor : some directions are given as to charitable legacies. Lord Camden's argument applied to the objections, that might be raised by the Defendant. I do not dispute his principles. They are very just, where they apply.

These Plaintiffs now insist upon the agreement, which they state. As to the extent of it, it does not exist any where so that I can see, what they agreed to: but the fact of some agreement is to be implied from the contemporary execution of the two instruments and the other circumstances. From the co-existence of the instruments and the execution at the same time I do infer, that they had agreed to make, the one a codicil, the other a will. I conclude with the bill, that both considered it an honorable engagement. I cannot direct the execution of an honorable engagement; that leaves the party to dispose, as he pleases; which rests upon nicer points, than a Court of justice can decide upon. I must say, they meant to impose upon each other a legal and binding obligation: that that was their intention, and they meant to do so. I adopt what the Attorney General said with great force: if they meant to bind themselves, and by a more formal and efficacious instrument than a will, I do not apprehend, any man of honor in the profession would have suffered Lord Orford to execute this agreement without a power of revocation inserted; for it would have been a most absurd deed for him to execute without giving himself a larger latitude to consider what he should do for his own issue female. It would have been by no means consistent with the mutual honor of the two parties to suffer him so to bind himself: for the remainder in the one will was worth nothing; that in the other, as these contingent interests are valued, was infinitely more valuable. But the obligation upon Lord Orford to bind himself strictly and in legal form according to the tenor of the will executed would have reduced him in many possible and probable instances of his life to great difficulty and distress. Marriage was in his contemplation. His daughters would have been totally set aside according to the engagement. Therefore in the supposed situation of the parties and the supposed arrangement it was not consistent with their honor to have this rest upon any more than that agreement, to be left *ad arbitrium* with that tie upon the mind. Choosing to do it by will, it is a wide conclusion for me to draw, that if the parties had been to express their agreement, it would have been in terms to make it finally binding upon each and irrevocable.

[*420] * But for this Court to execute an agreement it is always necessary, that the terms should be clear. Here it is uncertain, whether they meant it to amount to a legal obligation. There is no evidence, nothing, upon which I can obtain a clear and defined solution of that; and I lay it down as a general proposition, to which I know no limitation, that all agreements in order to be executed in this Court must be certain and defined: secondly, they must be equal and fair; for this Court, unless they are fair, will not execute them: and thirdly, they must be proved in such manner as the law requires. Upon a bill properly framed all these points would occur; and upon such a bill the Defendant would undoubtedly have the benefit of demurring. It is enough for me to say, I doubt upon every one of these points. There is great uncertainty with regard

to the terms and the extent of the agreement; and particularly, whether it was meant to be absolutely binding, or was, as the instruments purport, and the bill states, that it should rest upon honor. The counsel differed as to the extent of the agreement. Mr. Graham's idea I rather think most proper as to the extent (1). In that case I should say, it was not a fair agreement and not consistent with the honor of the parties, and then I doubt, whether, consistent with the respect, I always wish to pay to the Statute of Frauds, there is that degree of evidence that the law requires. From the consideration of respect to the parties and the argument I am saying too much in throwing out these difficulties, that would occur upon a bill properly framed. I am very sure, I ought to take no advantage from the Defendant by demurrer or any other defence against that bill. One advantage he certainly would have; that Mr. Walpole could not claim without renouncing the legacy of 10,000*l*.

Upon this view of the case the decree is perfectly of course. Dismiss so much of the bill as prays, that the will of 1756 may be established; and declare, that the will of 1752 is the will, to which the codicil of 1776 applies. Direct an account of the personal estate, &c. (2).

1. WHERE a testator has left two inconsistent wills, see, *ante*, note 3 to *Hill v. Chapman*, 1 V. 405, to which of them a subsequent codicil must be held to refer.

2. As to the latitude which Courts of Equity may take, in giving particular relief under the prayer for general relief, see note 5 to *Weymouth v. Boyer*, 1 V. 416.

3. A note of the case of *Dufour v. Perier*, (referred to in the principal case,) is given in 1 Addams, 278. The most general maxim, recognized in Equity, is, that *voluntas testatoris ambulatoria est usque ad mortem*; *Matthews v. Warner*, 4 Ves. 210; an instrument, though testamentary in form, if it contain a covenant to revoke, can only operate (if at all) as a *deed*, not as a will. *Reid v. Shergold*, 10 Ves. 375, 379.

4. That a contract of which the terms are uncertain, or in the progress of which there has been any misrepresentation, will not be enforced in Equity; and that, in such cases, parol evidence is admissible on the part of the defendant; see the notes to *Calverly v. Williams*, 1 V. 210, and the notes to *The Marquis of Townsend v. Stangroom*, 6 V. 328.

(1) Mr. Graham admitted in the argument, that making mortgages, provisions for younger children, or other charges, would have been in fraud of the contract: the other Counsel for the Plaintiffs did not carry it farther in extent than a covenant to leave and not to revoke without notice.

(2) *Post*, vol. iv. 616. See Mr. Hargrave's opinion upon the subject of this case in his *Juridical Arguments*, vol. ii. 272.

FREEMAN v. PARSLEY.

[1797, JUNE 26.]

GRAND-CHILDREN entitled under a bequest to issue. (a)

Assignees of a bankrupt, Defendants in respect of an interest in his wife, cannot take it without making a provision for her, (b) [p. 421.]

THOMAS ADLAM by his will, dated the 1st of September, 1775, devised and bequeathed all his worldly estate both real and personal of what nature, kind or sort, soever or wheresoever situate and being as well in Jamaica as Great Britain to William Freeman, his heirs, executors and administrators, in trust to the ends, intents and purposes, after mentioned: to wit, that he shall and do thereout in the first place pay all the testator's debts, and prove his will; and that he shall then after deducting the incident charges of executing this trust (over and above 50*l.*, which the testator desired him to accept as a token of esteem) pay unto the testator's half sister Elizabeth Rogers, widow, one moiety of the residue of his estate both real and personal: but in case of her decease, the said moiety to be equally divided between her lawful issue, share and share alike; "and the other moiety of the said residue of my estate both real and personal I desire he will pay among my first cousins," Edith the wife of Stephen Harris, Thomas Watts, and Mary Marman, widow, Susannah, the wife of Samuel Beavin, and Mary Scott, widow; "to be by him equally divided between them share and share alike; but in case of their decease or any of them such deceased share to be in like manner divided among the lawful issue of such deceased, and in default of such issue then such shares to be equally divided among the survivors:" and he appointed William Freeman executor; "and my further desire is that the net proceeds of my estate both real and personal (which I hereby order to be sold as soon as convenient) may be divided by him in manner before mentioned from time to time as fast as the money for the same can be collected and he shall have in hand the sum of 100*l.*"

The testator in July, 1791, sailed from Jamaica for London in a ship, which was not heard of after the month of August in that year. Elizabeth Rogers, Thomas Watts, and Mary Marman, died in the life of the testator. The testator's first cousin Edith, described in the will as the wife of Stephen Harris, was never married to him; and her real name was Wasborowe. She died without issue about the 25th of January, 1712: but whether before or after the death of the testator, could not be ascertained.

[* 422 * Elizabeth Rogers left three children: Sarah Parsley; who died in the life of the testator, leaving children:

(a) Who are entitled under the description of "issue"; see *ante*, p. 257, note (a) to *Davenport v. Hanbury*; also, note (a) p. 383, to *Horsepool v. Watson*.

(b) See *ante*, note (a) to *Burdon v. Dean*, 2 V. 607.

Hester Bargeer and Ann Redmond; who survived the testator; the former having children; who were born in the life of the testator.

Thomas Watts left four children: John Watts: who died in the life of the testator, leaving children; and Elizabeth Davis, Priscilla Linnard, and Martha Stroud; who survived the testator, having children born in the life of the testator.

Mary Marman left six children: John Marman and Martha Williams, who survived the testator, having children born in his life: James Marman, Elizabeth Dawkins, and Mary Gough, also living, but without children; and Edward Marman; who died in the life of the testator; leaving one child.

William Gough, the husband of Mary Gough, became a bankrupt.

The bill was filed by the executor to have the various claims ascertained; and the question arose upon the right of the grandchildren, claiming as issue; those, whose parents, children of the legatees named in the will, died in the life of the testator, claiming by their answers the shares of their respective parents; those, whose parents survived the testator, claiming an equal distribution with their parents respectively.

The executors of Edith Wasborowe claimed in her right; and the assignees of William Gough claimed in respect of the share of his wife Mary Gough.

Mr. *Mansfield*, Mr. *Richards*, Mr. *Cox*, and Mr. *Short*, for some of the Defendants, children of some of the legatees. The word "issue" must be confined to children. The testator could not mean issue *in infinitum*. If that is the construction, among what a number of people the division must be; and they must take share and share alike. He was looking to an event likely to happen, while the legatees or some of them were living; not to a very remote period. The word "but" instead of "and" must mean a substitution. To take in grand-children the Court must insert the * words "living at the death of the testator" after the [*423] words "in default of such issue."

Solicitor General [Sir *John Mitford*], Mr. *Steele*, Mr. *Campbell*, Mr. *Romilly*, and Mr. *Stratford*, for the grand-children. The true construction is, all the descendants living at the testator's death. The safest way is to decide according to the express language of the will. The direction to divide as fast as the money can be collected, and he shall have in hand 100*l.* shows, he meant a division immediately upon his death. It is not like *Lord Douglas v. Chalmer*, (*ante*, Vol. II. 501.). "Issue" is *nomen collectivum*, comprehending all descendants, unless there is something to confine it: *Cook v. Cook*, 2 Vern. 545; *Butler v. Stratton*, 3 Bro. C. C. 367; *Scott v. Chapman: Wyth v. Blackman*, 1 Ves. 196 (1). The doubt there was, whether it was not confined by the word "children." Here there is nothing to confine it. There is no purpose of convenience

(1) Amb. 555, under the name of *Wythe v. Thurlston*. That case is stated from the Register's Book, *ante*, 258.

or rule of construction to be answered be excluding grand-children. The rule is the other way. It is impossible to say, there is a default of issue, when there are grand-children. The provision, that in default of issue it shall go over, shows, it is impossible, that grand-children are not within the description.

Reply. It is plain from the testator's directions to his executors, that all was to be done at his death : he looked to no distant period. "Issue" in the common sense, means children ; though for technical purposes it is extended. In *Wyth v. Blackman* the decision is founded upon the division being to take place at a very remote period. *Cook v. Cook* is very short : the will and the circumstances do not appear. In *Butler v. Stratton* the word was "descendants ;" which is very general, and must take in all.

LORD CHANCELLOR [LOUGHBOROUGH]. In the common use of language as well as the application of the word "issue" in wills and settlements it means all indefinitely. I very strongly suspect, that in applying that to this will I am not acting according to the intention : but I do not know, what enables me to control it. If a medium could be found between a total exclusion of the grand-children, and the admission of them to share with the parents, the nearest objects of the testator, that would be nearer the intention ; [* 424] as by letting *in those, whose parents were deceased, to take the share, the parents, if living, would have taken : but that construction would be setting up my own conjecture against the obvious sense of the words. When you put the question, whether he meant, all these grand-children should take with their parents, I think, he would say, he did not ; yet if he was asked the other way, if it should go to the survivor, while there was a Defendant, I am equally clear, he would not have given it to the survivor. They are therefore all entitled (1).

The share of Mary Gough being claimed by the assignees of her husband, must be subject to a provision to be made for her (2).

As to the varying construction of the word "issue," see notes 1 and 2 to *Hockley v. Mawbey*, 1 V. 143. And as to the right of a *feme covert* to a provision in respect of her equitable interest in property taken by the assignees of her husband, see the note to *Burdon v. Dean*, 2 V. 607.

(1) *Davenport v. Hanbury*, ante, 257, and the note 260.

(2) *Burdon v. Dean*, *Onwell v. Probert*, ante, vol. ii. 607, 680, and the notes 609. Post, vol. v. 521, 739.

BARCLAY v. RUSSELL.

[1793, FEB. 4, 5, 8, 11; 1797, JUNE 27.]

BANK stock was purchased by the government of Maryland before the American war, and vested in trustees for the discharge of certain bills. After the peace upon a bill under an assignment by the new State of part of the stock, as a compensation to mortgagees of lands, that were confiscated, the fund, subject to that assignment, was claimed by the new State; and, there being no claim under the bills, the whole was claimed by the surviving trustee beneficially: also by the proprietary under the old government; and a specific lien was insisted on in respect of losses by confiscation, occasioned by the refusal of the trustees to transfer: held, that there was no lien; that the new State could take only such rights of the old as were within their jurisdiction; that the claims of the Plaintiff, the State, and in respect of the confiscations, were the subject of treaty, not of municipal jurisdiction; and the fund, no object of the trust existing, must be at the disposal of the Crown. (a)

The Court cannot decree against a title in the Crown apparent on the record, though not insisted on at the hearing, [p. 425.]

Confiscation by a foreign country is a subject of political, not municipal, discussion. It cannot operate upon property in this country, (b) [p. 429.]

Q. Whether a foreign sovereign can sue in a municipal Court of this country, (c) [p. 431.]

A Court of Law could not give judgment against the title of the Crown appearing on the record, [p. 436.]

IN 1733 the Government of the Province of Maryland in North America, then existing under Letters Patent from the Crown of Great Britain, granting the Province with very extensive powers to Lord Baltimore as proprietary governor, whose assent to all acts of Assembly was required, formed a project to create a paper circulation by an issue of bills, proposed to continue in circulation for thirty-three years. For this purpose, by an Act of Assembly passed in 1733, three Commissioners were appointed; and in order to provide a fund for the reduction in course of time and the final discharge of this debt a duty was imposed upon the exportation of tobacco, to be collected by bills of exchange to be given by the ship master for the duty of the specific cargo according to a rate specified; and most of these bills being drawn upon London, they were to be remitted to England by the commissioners for issuing the bills of credit; and the money, when paid, was to be vested in three trustees resident in London; who were to invest the money so paid in Bank-stock, to lay out the dividends, and keep annual *accounts of the stock bought and sold, &c. By this [*425] fund so created a sum according to calculation would have been provided sufficient to have totally discharged the bills of credit within the period intended. The act specified, that a payment should be made to the extent of one third of the issue between the

(a) This case is cited as an illustration of the doctrine that a demurrer to the jurisdiction will be good, where the subject is not properly cognizable by any municipal court of justice. Story, Eq. Pl. § 470.

(b) See *post*, p. 429, note (a)

(c) The doubt here expressed has not been sustained. See *ante*, note (a) to *Nabob of the Carnatic v. East India Co.* 1 V. 371; 2 Maddock, Ch. 306.

1st of September, 1748, and the 1st of September, 1749; by which time it was presumed, there would be a fund sufficient to discharge one third; and the manner, in which it was to be paid, was by drawing upon the trustees in England; and the trustees accepting the bills were to sell so much stock as would be sufficient to reimburse themselves. It was calculated, also, that the remainder of the issue might be extinguished by the year 1764; which was provided for in the same manner. The act proceeded to provide, that if, after all the bills were discharged, there should be any surplus of the fund, that was to be applied and disposed of, as the Assembly should direct. It was also provided, that Lord Baltimore should have the nomination of the commissioners; who were to be appointed by him or his governors, with a power to appoint commissioners in the room of those dying. The trustees in London were in like manner to be nominated by him: and it was expressly provided, that they were to act under his control and direction; with a power to him to remove any of them, and to appoint new trustees.

The bills were issued accordingly: but no advance was made in the reduction; and at the expiration of thirty-one years, no payment had taken place. On the contrary a larger issue was made to the same effect in 1765. Another act for the same purpose passed in 1769. The idea then was, that in twelve years from that time, means would be found to cancel them all. No progress however was made towards cancelling them: instead of that another act following the plan of the act of 1733 passed in 1773. The trustees last appointed by the act of 1769, were Hanbury, Russell, and Grove. In 1779 the government of Maryland established in consequence of the disturbances in America and the declaration of independence, passed an act for calling in the bills of credit; and the manner, in which it was proposed, was by giving to the holders bills of exchange drawn upon the trustees in London; and it was provided, that those trustees should be discharged from the trust:

they were directed to transfer the stock; and five persons [*426] resident in Maryland were appointed to be trustees * of the stock in England in their place. The act also directed that some persons resident at Paris should endeavor to obtain a passport for a person to go over to see to the prosecution of the act. That act having no effect, another act was passed in 1780; which directed a person called the Treasurer of the Western-Shore to draw bills upon the trustees in England, and to sell them in America; and that in case the trustees should refuse to act, or should suffer the bills to be protested, or in case the British government should interfere, the holders of those bills should have a right to attach the property of the three trustees, each of whom had some property in Maryland, and the property of Lord Baltimore's representatives. That act producing no effect but the confiscation, another act passed in June, 1783, before the treaty of peace; by which act the government of Maryland took upon itself to discharge the trustees; and to appoint Mr. Chase to act in their place. Upon the treaty of

peace in September, 1783, Chase came over under that appointment; and the trustees refusing to transfer, he filed a bill; upon which Russell and Grove upon motion discharged themselves, and transferred the stock to the Accountant-General. That cause proceeded no farther.

The partnership, in which Hanbury, one of the trustees, was a principal partner, were creditors of Daniel Delaney to the amount of 12,000*l.*; for which debt he gave them a mortgage upon his plantations in Maryland. Those plantations had been confiscated to the use of the State. After the treaty of peace an application was made by the partnership of Hanbury to the State of Maryland upon the ground of that clause in the treaty, under which they would have been entitled to recover the debt due from Delaney. That application in 1786, produced an Act of Assembly empowering Chase to assign to the surviving partners of Hanbury's house a portion of the bank stock to the amount of 11,000*l.* The bill was filed by the surviving partners of Hanbury, claiming under that assignment, and suggesting some claim upon the fund by the several Defendants. The Defendants were Chase; Grove the surviving trustee; the representatives of Russell and his partners, concerned in considerable iron-works in Maryland, that had been attached under the act of 1780; Mr. Harford devisee of Lord Baltimore; and the Attorney General. No claim was made by any of the bill-holders. It was suggested, that some of the bills remained in the hands of Russell: but that was not proved. * The Defendant Grove, [* 427] submitted whether any of the claimants were entitled to the fund. The representatives of the partnership of Russell claimed a recompense from this fund, as the property of the State of Maryland, in respect of their loss by the confiscation. They had received some compensation upon application to the commissioners for American claims. Mr. Harford claimed the property as belonging to the Old State of Maryland, and accruing to him either by forfeiture, as proprietary, or as the only remaining member of the Old State. The fund had accumulated to the amount of 60,000*l.*

Mr. *Mansfield*, Mr. *Graham*, and Mr. *Harvey*, for the Plaintiffs; and Mr. *Richards* and Mr. *Abbot*, for the Defendant Chase. The New State acquired by the treaty the rights of the Old State. The form of government only was changed: in other respects the State remained the same. According to Grotius and Puffendorf by a change of the form of government none of the rights of a nation are altered; debts due to and from it remain: Grotius *De Jure Belli*, lib. 2, c. 9, § 8. If it could have any other effect, it must be, that the persons, who usurped the government, acquired all the rights of the province as a conquered nation: there is no doubt except as to incorporeal rights; upon which Puffendorf *De Jure Belli*, lib. 8, c. 6, § 23, has much argument; stating the case between the Thebans and Thessalians before the great Council of Greece (1):

(1) When Alexander took Thebes, he found an instrument, in which it appeared, that the Thebans had lent the Thessalians a hundred talents. Alexander gave up

but Grotius, lib. 3, c. 7, § 4, delivers a decisive opinion, that incorporeal rights pass as well as corporeal. Therefore if this money is considered merely as a debt, the State of Maryland has a right to it. But money in the funds is not like a mere debt, but like money in a bureau; where it can be had, when called for. The definitive treaty provides, that creditors shall meet with no impediment on either side in recovering *bona fide* debts; and if the subjects of the State have that right individually, they must have it in their collective capacity as a Province or a Nation. There can be no lien upon this particular fund in consequence of the confiscation. For that purpose it ought to appear, that the property confiscated [*428] was applied in payment of those bills. All * liens must be by contract express or implied or by act of law. It is a political injury; the subject of reprisal or treaty. As to Harford's claim the province could not forfeit the money of individuals. He could only claim confiscations for crimes: but there could be no confiscation of the whole State. If the crown has released its right, it cannot be contended, that the proprietary has not. If the old Government is gone, he is gone, as a part of it. There being no claim now by any of the bill holders, they must be presumed to have been paid by some other mode. There is a high probability, that none of the bills exist; and there are one or two acts of the State declaring, that if they are not brought in by a limited time, they shall be considered as not existing. This is not the case of a corporation; which is very different from a province or state: but supposing it is so, if a corporation takes a new name, form, or quality, its rights and franchises are not removed: *Haddock's Case*, Sir T. Raym. 439. 1 Vent. 355. *Luttrell's Case*, 4 Co. 87, b. *The Corporation of Scarborough's Case*, 3 Lev. 237. *The Corporation of Colchester's Case*, 3 Burr. 1866. The treaty of peace may be considered in the nature of a new charter.

Mr. Lloyd, Mr. Fonblanque, and Mr. Campbell, for the representatives of Russell and the other partners, Defendants. There is a strong analogy between this State and a corporation. From 1776 to 1783 they were in the eye of this country dissolved: *The King v. Pasmòre*, 3 Term Rep. B. R. 199. Then any of their real property must have gone to the Crown; and by parity of reasoning, though escheat does not apply to this species of property, yet it ought to be considered as having gone back to the Crown, and as now belonging to it; Com. Dig. 3, tit. Franchise (G. 3, 4.) In *Ogden v. Folliott*, 3 Term Rep. B. R. 727, and which went to the House of Lords, it was held, that acts done during the rebellion in America were not to be considered as acts of a sovereign State; but were a mere nullity in the Courts of Law in this kingdom; and Lord Kenyon intimated a strong opinion, that if he was to consider the confiscation of the property of the Loyalists otherwise than as torti-

the instrument to the Thessalians. The Thebans upon their restoration by Cassander demanded the debt.

ous, he must consider those Loyalists as guilty of high treason against the States of America.

* Lord CHANCELLOR [LOUGHBOROUGH]. I do not con- [*429]
sider the decision of the Court of King's Bench as going
upon that ground. I cannot make out that idea to amount to more
than reprisal; which cannot be discussed in a Court of Justice.
There is a distinct and known instance. When the Duchy of Nor-
mandy was taken from the Crown of England in the reign of King
John, the lands of the Normans in England were seized by the
Crown, till the lands of the English in Normandy should be restored
to them; and were or ought to have been granted to those, who
suffered: but it must be by the intervention of the State. The
Court of Common Pleas (a) decided *Folliott v. Ogden* (1) upon a
clear ground; that confiscation in a foreign country cannot operate
upon property here; that no nation executes the criminal judgments
of another.

For the Defendants. If this fund does not belong to the Crown,
these Defendants have a specific lien upon it by the application of
their property in discharge of the bills, for which this stock was
pledged; and it is sufficient, that the appropriation of the prop-
erty confiscated appears by the Acts of Assembly produced by the
Plaintiffs.

Mr. *Hardinge* and Mr. *King*, for the Defendant Grove. This De-
fendant, though a mere trustee, retains his legal right here as well
as at law, till some other persons can take it from him by their own
strength (2). He has parted with it for safe custody only as between
him and these Plaintiffs: but that is no prejudice to his legal right.
In *Burgess v. Wheate*, 1 Black. 123, Lord Northington adverted to
the case of a grant of a perpetual rent and the death of the grantee
without any heir: there being nobody to call for the rent out of the
hands of him in possession, he holds without payment of the rent.
In that case a bare trustee did keep the estate. Certainly Lord
Thurlow in *Middleton v. Spicer*, 1 Bro. C. C. 201, did affirm, that a
bare trustee could not take a beneficial interest. There is no such
prerogative, that the Crown can take any personal property out of

(a) Lord Loughborough, while Chief Justice of the Common Pleas, gave an
opinion in this case. The doctrine was affirmed by Lord Ellenborough in a sub-
sequent case. *Wolff v. Ozholm*, 6 M. & S. 99. And it has been recently promul-
gated by Lord Brougham in clear and authoritative terms. *The lex loci*, he says,
must needs govern all criminal jurisdiction from the nature of the thing and the
purpose of the jurisdiction. *Warrenden v. Warrenden*, 9 Bligh, 119. It has also
been frequently recognized in the United States. *The Antelope*, 10 Wheat. 66,
123; *Scoville v. Canfield*, 14 Johns. 338; see, also, *The State v. Knight*, Taylor, 65.
Upon the same ground, the Supreme Court of Massachusetts has held, that a per-
son, convicted of an infamous offence in one State is not thereby rendered incom-
petent as a witness in other States. *Commonwealth v. Green*, 17 Mass. 515. The
latter decision, however, has been questioned with powerful reasons. *Chase v.*
Blodgett, 10 N. Hamp. 22. The local character of penal laws is most clearly
treated in Story, *Conflict of Laws*, § 619-625.

(1) 1 H. Black. 123.

(2) See *Williams v. Lord Lonsdale*, post, 752; *Walker v. Denne*, ante, vol. ii. 170.

the hands of the person in possession of it, because no one can claim it beneficially. In *Burgess v. Wheate* Lord Northington mentioned *Sandy's Case* as a decisive authority to the contrary.

[* 430] *Lord CHANCELLOR [LOUGHBOROUGH]. Lord Thurlow determined in *Middleton v. Spicer*, that where the executor is a trustee, and there is no next of kin, he is a trustee for the Crown. In *Burgess v. Wheate* there was a *terre-tenant*.

Mr. Mitford and Mr. Alexander, for the Defendant Harford. Upon *Ogden v. Folliott* and other cases the Act of 1780 could have no operation upon property in this country. The assent of this Defendant was as necessary to the disposal of this stock, as here the King's assent would be necessary, if it was to be at the disposal of Parliament; for the proprietary was as much a part of that legislature. The treaty ceded nothing but the land, territorial rights, and certain rights, which are specified; and that specification shows, nothing, that was not specified, was intended. All the rights, the inhabitants of Maryland had before, were not ceded: for instance; the right to be natural born subjects of Great Britain and Ireland was not ceded. The King had no right in this stock or the disposition of it before the treaty: till which it was in the two Houses of Assembly with the consent of the Lord and proprietary. The arguments from the writers upon the Law of Nations upon the conquest of one nation by another assume, that Maryland was a nation; which it was not. The true state of the question is, that part of a nation took from the State, of which it originally formed part, all control, formed itself into a new nation, and insists, that the property of those, who had the government of the country before, should be transferred to it. In that case so much only is conquered as can be absolutely possessed, or is ceded: but where the Old State is totally conquered, the New State becomes the old one; and all the rights are transferred; but upon the ground, that they are *idem populus*. The ground of the cases of corporations is, that the accession of the new charter did not destroy the former rights, but gave them activity, where from particular circumstances they were incapable of exercise, though they remained clear and undisturbed: but if the corporation had been wholly dissolved, they could only pass by a new grant from the Crown; which was the argument in the Colchester case. That question was only upon the Law of England. Both were created by the Crown: here only the former body was so created: the second arises by the violent acts of individuals in opposition to the Crown. According to *The* [* 431] *King v. Pasmore* if *an integral part of the corporation is gone, the corporation cannot supply that integral part, but is dissolved to certain purposes. The Plaintiffs cannot claim except by a transfer from the Old State to the new one; and that fails entirely. The violent acts of the inhabitants can give them no right. No act of his Majesty could or affects to do it. The treaty of peace certainly did not. If there is a specific lien, it extends to this Defendant.

No claim was made on the part of the Crown at the hearing.

LORD CHANCELLOR. Before this comes on again, I wish you to consider a question, which has affected my mind during the hearing. The bill is brought by persons stating themselves to be entitled upon good consideration to an interest in Bank Stock in this country in the names of trustees. They derive it from acts, which now from the treaty must be considered acts of a foreign independent State. I wish it to be considered, whether any foreign Sovereign under any denomination can sue in a municipal Court of this country; whether it is not matter of application from State to State. I do not think it easy to find in the old cases (1) any direct and plain authority. In 1 Roll. 133, it is said, such an action would lie: but Lord Coke's doctrine, if pursued farther, will be found to have vanished and to have come to nothing. They were cases in prohibition. The Courts of Law interfered in stopping the suits in the Admiralty Court, where they turned upon matters in their nature to be decided by the common law. It was a claim of goods supposed to be piratically taken from subjects of the King of Spain; but as to one Defendant it was not laid to have been done at sea; there was also in one of the cases (2) a bill in this Court against subjects of England, and a demurrer: the demurrer was referred to the Chief Justice and another Judge; and they were of opinion, the demurrer was good; and then a proceeding took place, anomalous, and which shows the difficulty, that occurred: from the hint in Hobart it is not easy to see what was done: but it seems to have* taken this course: they found, the bill could not be sustained; and the Judges were of opinion, that an action should be brought in the Court of Common Pleas by consent; * upon which they directed a [* 432] suit by consent in Chancery; and upon that proceeding they make some award and satisfaction to the party.

I wish you to consider it a little upon the general principle. The solution of the difficulty by the difference arising from the Plaintiffs being assignees occurred to me. The difficulty of giving costs is avoided; but assignees must rest upon the right of the assignor: and I doubt, whether in a municipal court the right of a sovereign independent State can be recognized.

There is another difficulty, This property in the Bank is to be considered either as the debt or interest of a public company: the produce might as well have been laid out in mortgages and in the purchase of land under a license to hold in *mortmain*: could either of those interests have been claimed by a sovereign independent State: If not, how will that apply to the case of personal property, if not directly, mediately a public debt from this nation? for Bank stock is a public debt: the 3 per cents are certainly so; and so is Bank stock, because counter-secured by the debt of the Public to the

(1) See all these cases cited in *The Nabob of the Carnatic v. The East India Company*, ante, vol. i. 382, 383; *Dolder v. Lord Huntingfield*, post, vol. xi. 283.

(2) Hob. 113.

Bank. It is now claimed in right of a sovereign independent State, that could neither hold mortgages nor lands here undoubtedly.

Reply. As to the case of mortgages or purchases of land, no mortgage could be made or land purchased by such a body but in the name of trustees. Then it comes to the same question ; whether that trust fund must not be disposed of some way or other for the benefit of the Province, by sale or paying the profits.

A sovereign may have personal property in this country. Sovereigns have been often resident here. In the reign of Henry the Seventh, the King of Denmark came here : and the King of Castile was cast on shore, and entertained by an ancestor of the Trenchard family. In the reign of Henry the Eighth the Emperor came over. Could not a sovereign during his residence here have redress for an injury ? The right is established by the cases in 1 Roll's Rep. 133. 1 Roll's Abr. 532, tit. Admiralty, 2 Bulst. 322. Hob. 78, 113. Moor, 850, the opinion in Selden's Table Talk, and the case in Reil. Pl. Parl. 143, 159 ; where the King of Norway sued the King of Scotland for a rent of lands in Scotland substituted for a marriage portion. The guardian of the infant King of Scotland [* 433] was the * other party. That case was taken notice of : and there was a provision, in case the King of Scotland should not appear.

Lord CHANCELLOR. The answer of the King of Scotland was, that he could not be sued in England, because he was a sovereign ; (a) and the Magnates would not permit it ; and then the war broke out.

Reply. If there is any such incapacity, it must be personal ; and in this instance it is removed by the assignment. It is not like *The Nabob of the Carnatic v. The East India Company*, ante, Vol. I. 371 ; Vol. II. 56. There perhaps the decree would have been impracticable : here the Court has the fund. If this argument holds, the trustee must hold contrary to the trust. *Penn v. Lord Baltimore*, 1 Ves. 444, was a suit between sovereigns. The State of Ireland was not changed by the alterations made in 1782 : till which time it was a dependent kingdom.

1797, June 27th. Lord CHANCELLOR (after stating the case). The acts of 1779 and 1780, the object of which, it is obvious, was, not to call in the bills, but to get access to this fund, are both extravagant, even according to the circumstances of the times ; for even if there was no interference of the British Government, it was totally impossible for the trustees with any regard to their duty or their in-

(a) A public vessel of war, of a foreign sovereign, at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. *The schooner Exchange*, 7 Cranch, 116. If a sovereign enters a foreign territory with the knowledge and license of its sovereign, the license, though containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation. A foreign minister is considered as in the place of the sovereign he represents ; and therefore not, in point of law, within the jurisdiction of the sovereign at whose court he resides. *Ibid.*

terest to have at all complied with the project of either of those measures. They could not make themselves liable by accepting the bills: nor, while there was any law existing in this country, could they take upon themselves to sell the stock; which would have been a breach of trust. Therefore the idea of confiscating their property, and much more that of Lord Baltimore, was grossly unjust. The partnership of Hanbury had a very good cause of demand against the State; that they having destroyed the security for the debt from Delaney should account to them to the extent of their mortgage. That produced the assignment, under which the Plaintiffs claim. The representatives of the partnership of Russell attempted in argument to raise their claim up to a specific lien; and Mr. Harford endeavored to set up a claim to this stock, as property belonging to the Old State and accruing to him by forfeiture as proprietary. The question, upon which all the rest must depend, is, whether the present State of Maryland had a right to * make the [* 434] assignment to the Plaintiffs. For the Plaintiffs it was argued, that all right belonging to Maryland in its former condition as a body corporate is transferred to the new self-created Government, and by the effect and operation of the treaty of peace.

First, with regard to the treaty of peace: in the whole form of that treaty the only effect is to recognize the existence of the new dominion. From the declaration of independence it considers it, no matter how created, as an independent power: but there is nothing, by which any thing at all is either ceded or granted to this New State of Maryland. Whatever is within the reach of the acts passed, and the authority, by which those acts passed, that State may take; and we must consider them by virtue of the relation in the treaty as acts, we have no right to dispute. They may be just or unjust morally: but they must be binding. But to what extent the authority making those acts could go is a question. Money, stock, or securities, might have belonged to the former State as a political body: but it is perfectly clear, neither land nor money beyond their power can be affected by their political acts. They must be regulated and disposed of by the law of the country, where that land or money is placed. The treaty acknowledges their independence from the year 1776; and no act, they could have done in the character of an independent State, could affect property not subject to their local jurisdiction. It is obvious, nothing in the treaty recognizes as valid the act of 1779 discharging the trustees, appointing new trustees, and directing a transfer of the stock here. They have no right as an independent State to make such an act as that. No foreign authority of the Germanic body or France or Spain could do such an act. Nothing, they could do with regard to this, can be implied from the treaty. There might have been an express article in the treaty upon their claim to this subject. It might have been the subject of a specific article. Such a demand is a fit subject of treaty; to be settled as between States independent. I can find no general principle in any writer upon the Law of Nations, if it was proper

for me to decide by reference to those laws ; but I have looked for my own satisfaction ; and I find no general principle carrying it farther, than that the new formed Government may invest itself with all the rights, that it can command : no farther. The old Government of Maryland, a Government of a singular species, existing by Letters Patent, in some degree similar to a corporation, [*435] possessing rights in England, must sue *in England, and ought to be regulated by the law of England ; under which it has its existence. In the argument it was said, the present State of Maryland has some species of right to stand in the place of the old Government, being now acknowledged to be a legitimate Government. I can admit, that there is a semblance of equity in the claim upon the part of the present State of Maryland. The stock was certainly purchased at the expense of the people of Maryland. It was purchased by their money, and fairly ; for the tax being laid upon the tobacco of Maryland, that tobacco in comparison with the tobacco of Virginia and other States would come to market with just the disadvantage of that tax. The purchase was made for the benefit of the people of Maryland, to be applied to public uses in that State. It is true, its original destination may be preserved. These are considerations very fit to be weighed : there may be other considerations, that would balance a little in the scale against them : but the effect of these considerations cannot be settled here ; for it is obvious, that in stating these points I am stating, not a judicial, but a political, equity ; the foundation of representations to be made from State to State, exceedingly fit to be weighed : perhaps considerations in favor of some of the Defendants might counterbalance a little : but there is no equity upon these considerations, upon which this Court can decide.

Consider then the situation, in which the fund now stands. It is upon a specific trust declared by the act of 1733. Standing in the name of the Accountant General, it is exactly as if vested in trustees. The specific execution of that trust is perfectly impossible now. The power, by which the trustees are to be created, is an Act of Assembly ; which could not pass an act without the consent of the proprietor, who no longer exists. There is no specific purpose therefore, that the will of the present Government can point out, for which purpose according to the original creation of the trust I can direct the trustees to transfer. Therefore it is the common case ; a trust without any specific purpose, to which it can be applied. The consequence is inevitable ; that it is for his Majesty to appoint, for what purpose that stock shall be applied ; considering it still in the name of the surviving trustee Grove. The result of my opinion therefore is, that the right to dispose of this money is vested in the Crown. The Attorney General by his answer claims. At [*436] the hearing *before me there was no appearance for the Attorney General. Before Lord Thurlow the Attorney General discussed a little, but claimed nothing. Lord Thurlow observed, that he only rose as *amicus curiæ*, without stating any thing

officially on the part of the Crown. The Plaintiffs have not a right to claim under the assignment from the State: but they will still stand in the same condition as the Defendants, so far as they are sufferers by the acts of the State in detriment of their property, as to such claims, as they with the others would have in respect of the damage, they sustained by the war. I certainly feel, that they have morally, and perhaps to a higher extent, a claim against the Government of Maryland: but it is to be addressed to the present State of Maryland. They have a claim to the compensation, which this country has very honorably provided for a great example to posterity. The compensation, I believe, has been quite equal to the whole amount of the loss. It may not in all instances have been quite equal to the individual loss; though in some instances, I believe, the compensation has been much more than the amount of the damage, or than what the individual could have gained, if the war had not happened.

But if this property could be maintained as belonging to the province, I could not say there was a lien upon it. As little can I say so, if it belongs to the Crown. They have a general claim, but no claim upon this stock, whether belonging to the province or the Crown. I can make no declaration therefore for either the Plaintiffs or the Defendants as sufferers in consequence of the acts, that have been done. Therefore I must dismiss this bill; for though no claim has been made by the Attorney General, yet upon the record a title appears to the Crown. A Court of law could not give judgment, nor can this Court decree, against the title of the Crown appearing upon the record. But as some disposition must inevitably take place as to this money, as there is a possible disposition, under which some benefit may accrue to the Plaintiffs, though I do not know, to what extent, and as a bill would be necessary for any one claiming under the state, if the Attorney General has any instructions now, or thinks it probable, he shall have any, I will suspend the order; because I think, a possible case may arise, in which the Court may make some arrangement of the property even in this suit. I think it right also to mention, that upon the supposition, that I was to dismiss the bill, there must *be some declaration as to the costs: [* 437] but if I can make any species of decree upon any part of the case, I think it very fit, that the costs of all parties should come out of the fund.

1. An application, made in an earlier stage of this suit, for an order to direct the Attorney General, as such, to appear to the bill, was refused by Lord Thurlow. See 2 Dick. 729.

2. As, where the executor is a trustee, if no next of kin can be discovered, the executor holds his testator's personalty in trust only for the Crown; so, if the testator has directed money to be laid out in the purchase of real estate, trustees, unless they have the legal estate in the lands so purchased, cannot hold against the Crown claiming by escheat. *Walker v. Denne*, 2 Ves. Jun. 170. See also *Williams v. Lord Lonsdale*, 3 Ves. 757.

3. With respect to the cases in which foreign governments or sovereigns may

be parties, plaintiffs or defendants, in the municipal courts of this country, see, *ante*, note 2 to *The Nabob of the Carnatic v. The East India Company*, 1 V. 371.

4. The doctrine, that no country regards the penal laws of another, was recognized in *Wolff v. Orholm*, 6 Mau. & Sel. 99; but see, *post*, the note to *Talleyrand v. Boulanger*, 3 V. 447.

HYDE v. PRICE.

[ROLLS.—1797, JUNE 19, 21, 23, 28.]

TRUST in a deed of separation to permit A. to receive the dividends of stock for the maintenance and support of the wife; with a covenant of indemnity to her husband: a grant by her of an annuity out of the dividends was held void, (a)

Q. Whether a married woman having a separate maintenance can be sued as a *feme sole*? (b) [p. 443.]

A married woman, living apart from her husband upon a separate maintenance, cannot bind him by her contract, (c) [p. 445.]

By indentures, dated the 19th of June, 1779, reciting, that differences had arisen between William Price and Mary, his wife, and they had agreed to live separate, and previously to such separation William Price had agreed to pay and allow to Elizabeth Gittins, her executors, &c. for the support and maintenance of Mary Price the yearly sum of 100*l.* during the joint lives of himself and his said wife, William Price covenanted with Elizabeth Gittins, that he would permit Mary Price from time to time and at all times during her life to live separate and apart from him, and to reside at such places and with such friends, as she should from time to time at her will and pleasure notwithstanding her present coverture, and as if she were a *feme sole*, think fit; with the usual covenants not to molest, disturb or sue, her or any person receiving her, and not to claim any of the property then given to her, or which she might afterwards acquire; and that she and her assigns shall from time to time and at all times hereafter peaceably and quietly enjoy and absolutely dispose of the same, as if she were a *feme sole* and unmarried; and that William Price shall and will yearly and every year pay and allow to Elizabeth Gittins, her executors, administrators and assigns, for the maintenance and support of Mary Price during the joint lives of William and Mary

(a) For the way in which deeds of separation are regarded in Equity, see *ante*, p. 352, note (a) to *Legard v. Johnson*.

(b) The doubt that seems here implied is now removed, and it is firmly established in the jurisprudence of the common law, that a *feme covert* cannot, by a deed of separation, become a *feme sole*, so that she can be sued alone. The doctrine declared by Lord Mansfield in *Corbett v. Poelnitz*, 1 T. R. 5, has been repudiated in a succession of cases. See Hovenden's note at the end of the present case; and 2 Kent, Comm. 153—161, (5th edit.) An important question remains, whether a wife divorced *a mensa et thoro* can sue and be sued as a *feme sole*. *Ibid.* 157, 158; *Dean v. Richmond*, 5 Pick. 461; *Peirce v. Burnham*, 4 Metcalf, 303.

(c) This was ruled as early as *Todd v. Stokes*, 1 Salk. 116, and recognized in *Nurse v. Craig*, 5 Bos. & P. 143. It has been adopted in New York. *Baker v. Barry*, 8 Johns. 72; *Fenner v. Lewis*, 10 Johns. 38; and, probably, in the jurisprudence of the other States. 2 Kent, Comm. 161, (5th ed.)

Price, one annuity of 100*l.* by four quarterly payments upon the 29th of September, &c.: and that in the case William Price should at any time become entitled in possession to any lands, tenements, goods, chattels, and effects, real or personal, over and above what he was then possessed of, to the clear yearly value of 100*l.* or upwards, then he shall yearly during the joint lives of him and his wife pay to Elizabeth Gittins, her executors, &c. one third part thereof for the farther and better support and maintenance of the said Mary Price, payable in the same manner; and it was agreed, that if Mary Price should become entitled in possession to any real or personal property to the amount of 2000*l.* in the whole, or to the yearly value of 200*l.*, the annuity of 100*l.* should cease; and Elizabeth Gittins covenanted to indemnify William Price *against debts [* 438] contracted by his wife, and all claims of alimony or maintenance, except as provided by the said deed, and any assault, battery, or trespass, committed by her, or any other cause, matter, &c. concerning the said Mary Price.

By indentures, dated the 20th of January, 1794, reciting the former deed, and the death of Elizabeth Gittins upon the 26th of November, 1779, after having by her will appointed Mary Phipps her executrix, and that William Price had become entitled in possession to one third of a moiety of the residue of the personal estate of Andrew Stone, and that Mary Phipps died upon the 17th of October, 1792, having appointed William Man Godschall her executor, and that William and Mary Price and their son John Price having occasion for money to answer their immediate purposes, and being desirous to settle and secure some certain provision for Mary Price during her life in lieu of the provisions made for her support and maintenance during the joint lives of her and William Price by the deed of 1779, and William and Mary Price being desirous to make a provision for their son John Price, and that it was agreed, that 2222*l.* 6*s.* 1*d.* 4 per cent. Bank Annuities, part of the share of William Price in the residue of the personal estate of Andrew Stone, should by the sale or transfer of 2918*l.* 2*s.* 5*d.* 3 per cent. Consolidated Bank Annuities, other part thereof, be made up to the sum of 2500*l.* 4 per cent. Bank Annuities; and that the said 2500*l.* stock, should be settled; and that the remainder of the said 3 per cent. Consolidated Bank Annuities should be transferred, as after mentioned; and that in consideration of the provision intended to be made for the support and maintenance of Mary Price during her life she and William Man Godschall, as her trustees, should relinquish the provisions made by the deed of 1779, and release William Price accordingly; for carrying the said agreement into execution, and in consideration of the natural love and affection of William and Mary Price for their son John Price, and for the making such provision for the support and maintenance of Mary Price during her life and for John Price after her decease, in case he should survive her, it was agreed, that the trustees of the said 3 per cent. Consolidated Bank Annuities should by sale or transfer of a sufficient part thereof

raise so much money as would purchase 277*l.* 13*s.* 11*d.* 4 per cent. Bank Annuities, and transfer the same together with the said sum of 222*l.* 6*s.* 1*d.* 4 per cent. Bank Annuities to Edward [* 439] * Wallwyn Shepherd and William John Playters upon the trusts after expressed; and that the trustees of the said 291*l.* 2*s.* 5*d.* 3 per cent. Consolidated Bank Annuities, should transfer one fourth part of the residue thereof to William John Playters, his executors, &c. upon the trusts after expressed, one fourth to John Price for his own use and benefit, and the two remaining fourths to William Price, his executors, &c.; and as to the fourth part transferred to Playters, the trust declared was, that he shall from time to time, and at any times sell and dispose of the said stock; and pay and apply the produce to the use of Mary Price, or such person or persons, as she the said Mary Price shall from time to time by any deed or writing under her hand and seal attested by one or more credible witness or witnesses direct and appoint; and that in the mean time and until such appointment he, his executors, &c., shall and may pay over to the said Mary Price, or whom she shall direct, the net yearly produce and dividends of the said stock, or so much as shall remain undisposed of; and that the receipt of the said Mary Price for such sum or sums as shall from time to time be paid to her or to her use by the said William John Playters, his executors, &c., shall be a good and sufficient discharge as fully and effectually to all intents and purposes whatever, as if she had been a *feme sole*, and as to the said sums of 277*l.* 13*s.* 11*d.* and 222*l.* 6*s.* 1*d.* 4 per cent. Bank Annuities, making together the sum of 2500*l.* like Annuities, the trust was, that the trustees and the survivor, his executors, &c., shall permit William Man Godschall, his executors, administrators or assigns, to receive the interest, dividends, and annual proceeds, for and during the natural life of Mary Price for her maintenance and support in lieu of the provisions by the indenture of the 19th of June, 1779, for her support and maintenance during the joint lives of her and William Price; and in case John Price shall survive Mary Price, upon trust to transfer the said 2500*l.* stock to him for his own use and benefit: but in case he shall die before her, then upon trust after her decease to transfer the same for William Price, his executors, &c.; and William Man Godschall and Mary Price released accordingly the provisions for her in the deed of 1779; and in consideration of the said release William Price covenanted, that he would from time to time and at all times permit Mary Price to have and enjoy for her own sole and separate use all and every sum and sums of money, lands, tenements, &c., goods and chattels or other property, which might be bequeathed [* 440] to her, * or which she might have or come to by will or upon the demise of any person, as fully and effectually to all intents and purposes whatsoever, as if she the said Mary Price were a *feme sole*: Provided, that it shall be lawful for the trustees with the consent of William and Mary Price, or of Mary Price, in case she shall survive William Price, and of William Man Godschall,

his executors, &c., to sell the said stock and invest the money produced by the sale upon the same trusts; and that if the trustee Shepherd should die or desire to be discharged, William Price, his executors, &c. should nominate a new trustee; and if William John Playters shall die or desire to be discharged, William Man Godschall with the consent of Mary Price shall nominate a new trustee; and so from time to time, when any trustee shall die or be desirous to relinquish; and it was declared that the deed of 1779 should remain in force in all respects, except so far as it was thereby revoked or varied.

Mary Price continuing to live separate from her husband under this deed had occasion for the sum 560*l.* to enable her son John Price to join his regiment of militia or to purchase a commission in the army for him; for which purpose by a bond dated the 25th of May, 1795, in consideration of 560*l.* Mary and John Price became jointly and severally bound to William Hyde in the penal sum of 1120*l.* to be void on payment by Mary and John Price and the survivor of an annuity of 70*l.* to Hyde, his executors, administrators, and assigns; with warrant of attorney, &c.; and for farther securing the payment Mary and John Price by indentures of the same date in consideration of the said 560*l.* paid by Hyde for the purchase of the said annuity secured by the said bond and warrant for the lives of Mary and John Price and the survivor, sold to Hyde one annuity of 70*l.* issuing and payable out of and charged upon the said 2500*l.* 4 per cent. Bank Annuities, and upon the interest, dividends, and annual produce, thereof, and out of and upon all their right, title, property, &c. in the same both at law and in equity; to hold receive and take the said annuity for the joint lives of Mary and John Price and the life of the survivor; and Mary and John Price directed the trustees Playters and Shepherd and William Man Godschall to pay the same accordingly.

By indentures, dated the 11th of August, 1795, Mary and John Price sold another annuity of 30*l.* for their lives and that *of the survivor to Thomas Shearcroft; which annuity [*441] was also charged upon the 2500*l.* 4 per cent. Bank Annuities.

The bill was filed by Hyde; praying an account of the dividends in respect of the 2500*l.* 4 per cent. Bank Annuities in the hands of the trustees, and of what was due upon the Plaintiff's annuity; that the fund may be transferred to the Accountant General; and that what shall be found due to the Plaintiff and the future payments from time to time may be paid out of the dividends and interest of the said stock.

The Defendant Godschall by his answer claimed a lien upon the fund, prior to any incumbrance of Mary Price, to reimburse himself any loss, costs or charges, by reason of the covenant of Elizabeth Gittins, as her representative.

Mr. Lloyd, for the Plaintiff; Mr. Grant and Mr. Pemberton, for the Defendant Shearcroft. This *feme covert* might grant an annuity

out of her separate maintenance. It is always given for the maintenance and support of the wife; and there is no such contract between husband and wife without a trustee. It is now an axiom in Westminster Hall, that a married woman under such circumstances is a *feme sole*, and may be sued as such; *Corbett v. Poelnitz*, 1 Term Rep. B. R. 5. There is no decision against that case. The husband having once made her an allowance becomes completely exempted from all debts on her account. They must contend a general proposition; that she has no power whatever over her separate maintenance. In Equity her trustee is bound by her acts. Whatever ground there may be for saying, that this being merely for maintenance should not be in her power, Courts of Equity have not proceeded upon that. Every day's experience and many cases prove, that a married woman may dispose of her separate property for her husband's debts: *Pybus v. Smith*, ante, Vol. I. 189. 3 Bro. C. C. 340. There is in this instance a fair motive. *The Duke of Bolton v. Williams*, ante, Vol. II. 138, is an authority, that a married woman having separate property may grant an annuity. All the cases were there cited; and the Lord Chancellor recognized the doctrine, that she may be sued at law as a *feme sole*, and that this Court will aid a lien upon her separate property, and call forth that property to be applied in satisfaction of that demand.

[*442] * Mr. *Pigott* and Mr. *King*, for the Defendant *Godschall*; Mr. *Johnson* for Mary Price, and Mr. *Alexander* for her husband. Mary Price had no power to grant this security. This is not her separate property, but an appropriation for her maintenance under a trust imposed upon it, under which the Plaintiff makes no case to take it from the trustee, the husband, or the wife. The Plaintiff cannot state any money laid out by him in maintaining her. *Godschall* is a trustee for the husband as well as the wife. The husband has a right to appropriate any part of his property for the maintenance of his wife, and to put it out of her power to apply it to any other purpose. The covenant by the first deed is with Elizabeth Gittins, making her a trustee to pay over this money from quarter-day to quarter-day; and there is a covenant by her to indemnify the husband not only against criminal proceedings of his wife, but against any action, that may be brought against him. By the second deed the fund is given to the trustees for the specific purpose of paying over the produce to *Godschall*; and he is to expend it for her maintenance. The cases referred to are recent, and have overturned the Common Law; and there is considerable doubt, whether they will stand: but we need not quarrel with them. In those cases the property was given to the sole and separate use of the wife; and from the moment it was so given, it was in her power: but in this case the husband anxiously provided, that she should not have power over it. At every quarter-day upon her application, or the production of a sufficient authority from her the trustee must pay, unless he has notice of any demand upon the husband, or unless it is obvious, that the application is for a purpose totally distinct from the

object of the trust. It has been lately determined, that the half-pay of an officer cannot be assigned (1). That is the case of all appropriations for a particular purpose.

Reply. The trustee could not have compelled her to receive this provision in small sums at his discretion; she might have come here, saying, she had contracted debts; and this Court would have compelled him to pay her all the dividends. His name was inserted only for the sake of putting in the covenant of indemnity: the person, who drew the deed, probably not knowing, that the Court of King's Bench held, as I think they meant to hold, that after separation in no case could the husband be liable. Suppose, *she had saved out of this fund, would the savings have [*443] gone to the husband? or suppose, *aliunde* she had enough to live upon, letting this fund accumulate: she might have disposed of those savings, even if in the hands of a trustee, either by deed or will; and if so, she could dispose of the fund. Every deed of separation contains the words "maintenance and support." If she was in a condition to bind her person by contract according to *Corbett v. Poelnitz*, she must be in a condition to bind her property. If any particular trust was intended by inserting Godschall's name, it is not sufficiently expressed. Lord Thurlow in *Pybus v. Smith* was very anxious to confine the trust: but he thought, that according to the rules of the Court the deed had not gone far enough. The word "support" is very large.

June 28th. MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. The question would be, if it rested upon the first deed, whether that made Mary Price a *feme sole* to all intents and purposes. I am clearly of opinion, that the second deed makes no alteration except the substitution of the dividends of the stock for the covenant of the husband; and it left the Defendant Godschall as executor of Elizabeth Gittins liable under her covenant contained in the deed of 1779. The question is, whether this woman could alienate the property so appropriated and destined by her husband. It is contended, that in a Court of Equity this deed leaves it in her power to dispose of this, as she pleases; to leave herself without any maintenance; and to leave her husband and her trustee responsible for her maintenance. It is contended, that though the husband is compellable by law, as every husband is, to maintain his wife, he cannot appropriate a sum of money for her maintenance without putting it in her power to alienate it, and to divert it from the purpose, to which he appropriated it. Till the case of *Corbett v. Poelnitz* (2) I thought, an action could not be maintained against a married woman, unless her husband had abjured the realm. In *Hatchett v. Baddeley*, 2 Black. 1079, Mr. Justice Blackstone says (it is very well worth remembering) he is clearly of opinion, that in no

(1) *Stone v. Lidderdale*, 2 Anstr. 533; 4 Term Rep. B. R. 248.

(2) That case is now overruled, and the old law restored, upon the opinion of all the Judges in *Marshall v. Rutton*, 8 Term Rep. B. R. 545. See *post*, vol. v. 17, and the note to *Chaseing v. Parsonage*.

case can any *feme covert* be sued alone, except in the known excepted cases of abjuration, exile, and the like; where the husband is considered as dead, and the woman as a widow, or else as divorced *a vinculo*. In *Lean v. Schutz*, 2 Black. 1195, all the cases are cited; and I have taken the pains to look at every one of them;

and they all show, that except in the cases excepted by Mr.

[* 444] Justice Blackstone no action can be *maintained against a married woman. Then came *Corbett v. Poelnitz*; and there the Court were of opinion, that the action could be maintained. Mr. Justice Blackstone in the last edition of his Commentaries that he published, continued to state his text, as he did in the Court of Common Pleas, without altering it: 1 Bla. Com. 443, but the editor of the last edition notices these cases (1); and to obviate the conclusion, that it is so fully established, as the editor supposes, that she is to all intents and purposes a *feme sole*, I refer to *Caudell v. Shaw*, 4 Term Rep. B. R. 361, only with regard to the doctrine of Lord Mansfield in *Read v. Jewson*, Hil. 13 Geo. III. (not long before *Corbett v. Poelnitz*); which is there stated by Mr. Justice Buller. Lord Mansfield arguing against the judgment, that was entered up in that case, says "a married woman cannot be made Defendant without her husband; and if she cannot (and no case has been cited to show, she can), she cannot give a warrant of attorney to confess judgment."

In every one of the cases, that have occurred, it has been uniformly understood, that the act of the wife or of the husband and wife jointly cannot either by custom or contract or otherwise make her a *feme sole*, so as to be subject to the process of law as such, and to be sued as *femes sole* are sued. The same doctrine as that of *Corbett v. Poelnitz* came before the Court of King's Bench, in *Gilchrist v. Brown*, 4 Term Rep. B. R. 766, and *Ellah v. Leigh*, 5 Term Rep. B. R. 679. The Court evaded the question, how far *Corbett v. Poelnitz* was to be acquiesced in to its full extent: but Lord Kenyon shows, that he entertained a doubt upon the subject; which is all, I wish to have understood; that it may not be considered as quite acquiesced in. Lord Kenyon observes what is very observable in the case of Lady Percy, that there were trustees, and the trustees were not before the Court; therefore he did not know, how that property could be got at.

The question now is, whether the authority of that case weighs so as to prevent the opinion of the Court without infringing upon it. Without deciding against that case I am authorized to consider this, as if no such case had been decided: for whether a mar-

[* 445] ried woman having a separate maintenance may or *may not be put in the situation of a *feme sole* by the contract of her and her husband is not for a Court of Equity to decide; but I am to construe the deed now before the Court; and to say, whether the husband did intend, that his wife should have that dominion. I

(1) See the note to the 12th edition.

am clearly of opinion, he did not ; and that I should give the instrument a different effect from that intended by the parties, if I held so. There is a very material covenant to indemnify the husband. The husband thought, he stood in need of that ; and notwithstanding the authority of *Corbett v. Poelnitz* I must think, he was extremely wise in taking that covenant. It was not determined in *Corbett v. Poelnitz*, what is to be the case, if the wife should become a pauper : could not the parish call upon the husband to maintain her ? Does not she follow the settlement of the husband ; or could she acquire a new one ? Could not an action for her trespass or battery be brought against the husband ? It is true, that living apart she cannot by her contract bind her husband ; no credit being given to him. I think, *Corbett v. Poelnitz* goes this length ; that if an estate is left to the use of a married woman in this way, she can alienate it without a fine. That would go farther than has been ever supposed. I only desire to be understood not entirely to acquiesce under all the consequences, that might result from that case ; and with that salvo I decide upon this instrument ; which is merely to pay into the hands of the trustee for that purpose only. In *Hulme v. Tenant*, 1 Bro. C. C. 16, Lord Thurlow gave much the same opinion, as the Judges in the Court of Common Pleas did ; that with regard to property she was a *feme sole*, but not to charge herself personally. My opinion inclines the same way. I am of opinion, that this is not property, she is entitled to, to her sole and separate use. There is a special trust upon it. She has no dominion over it ; and her remedy for a misapplication is in this Court. The grant made by her is in defiance of the deed ; and therefore cannot be enforced in this Court (1).

The next question is, what decree ought to be made. Godschall has a right to receive, and will be bound to apply this for her maintenance and the indemnification of her husband. I therefore cannot order it to be paid to the husband or for any other purpose. No doubt, it is a good grant, as far as it affects the interest of the son. He has only a contingent interest : but if he survives his mother, the fund will certainly be amenable to *the annuities. Therefore it is not right to dismiss the bill. The next question is, whether it ought to be dismissed, so far as it seeks payment of this annuity against Mary Price, with costs. If no doubt was thrown upon *Corbett v. Poelnitz*, it was very unwise to treat with this woman for an annuity. One would not wish to make them throw away more money, and to load them with costs : at the same time the costs of the Defendants must certainly be paid : but I think, there will be a fund for that.

Let the bill, so far as it seeks payment of the annuity out of this fund during the life of Mary Price, be dismissed ; and let the fund be transferred to the Accountant General, and the dividends be paid to Godschall, to be by him applied for her maintenance ; and let the

(1) *Worrell v. Jacob*, 3 Mer. 256.

dividends, that have been received by the trustees, and not applied, be paid to the Accountant General; and out of the same let the costs of the Defendants except Shearcroft be paid; and let the residue be paid to Godschall, to be by him applied for the maintenance of Mary Price; with liberty to her, in case she shall survive her husband, to apply; and also with liberty for the Plaintiff, or William Price, after the death of Mary Price, or any person interested, to apply.

1. THE authority of the case of *Corbett v. Poelnitz*, which was questioned in the principal case, and in *Beard v. Webb*, 2 Bos. & Pull. 106, was completely destroyed by the decision in *Marshall v. Rutton*, 8 T. R. 545, where it was determined, that a *feme covert* cannot contract and be sued as a *feme sole*, even though she be living apart from her husband, having a separate maintenance secured to her by deed; with regard to property, a woman so circumstanced may be a *feme sole*, but not to charge herself personally: this doctrine, which restored the old established rule of law, has been, ever since the case of *Marshall v. Rutton*, generally acquiesced in. *Boggett v. Frier*, 11 East, 303; *Hookham v. Chambers*, 3 Brod. & Bing. 93; *Lord St. John v. Lady St. John*, 11 Ves. 529; *Lewis v. Lee*, 3 Barn. & Cress. 297.

2. But, although a husband and wife cannot, by contract between themselves, release the husband from responsibility as to debts incurred by his wife for necessities, yet, this object may, substantially, be effected by the intervention of a third person, who, as trustee for the wife, binds himself to indemnify the husband against the debts of his wife. *Legard v. Johnson*, 3 Ves. 359. And, as the husband will be entitled to the benefit of such covenant, so he must himself specifically perform the engagement for which that covenant was the consideration. *Worrall v. Jacob*, 3 Meriv. 270; *Jee v. Thurlow*, 2 Barn. & Cress. 553; *Elworthy v. Bird*, 2 Sim. & Stu. 381. Even as against creditors of the husband, such a covenant is deemed a valuable consideration, sufficient to take a settlement, of which it forms a part, out of the purview of the stat. 13 Eliz. *Stephens v. Olive*, 2 Brown, 93; *Copis v. Middleton*, 2 Mad. 430. And where the husband has behaved so ill as clearly to entitle his wife to obtain a decree against him for alimony; should she, instead of making an application to the Spiritual Court, agree to accept a settlement from him, for her separate maintenance; the fact of relieving the husband from the consequences of a suit for alimony is an immediate and valuable consideration, which (putting the bankrupt laws out of the case) will support the settlement so made on the wife. *Nunn v. Wilmore*, 8 T. R. 528; *Hobbs v. Hull*, 1 Cox, 446.

MARQUIS OF DONEGAL v. STEWART.

[1797, JUNE 28.]

THE answer need not set forth an account, where the ground, upon which it is prayed, is denied; as where the bill charged a dealing in pictures by commission, and the answer denied that; and stated, that the Defendant sold them to the Plaintiff in the course of his trade. (a)

THE bill was filed for an account of dealings and transactions between the Plaintiff and Defendant; charging, that the Plaintiff

(a) In negating the ground upon which the account is prayed, the jurisdiction of the Court is displaced. There is nothing requiring the peculiar aid of Equity. See 1 Story, Eq. Jur. § 458; *Foster v. Spencer*, 2 Johns. Ch. 171; *King v. Rossett*, 2 Y. & J. 33.

employed the Defendant to purchase pictures by commission ; and that in the course of that employment for many years the Defendant practised several impositions upon the Plaintiff ; and thereby obtained from him several securities.

The Defendant by his answer stated, that he was a dealer in pictures ; and in the course of that trade sold pictures to the Plaintiff ; and he positively denied, that there was any dealing by commission. The Plaintiff excepted to the answer on the ground, that it did not set forth the sums given by the Defendant for the pictures ; and the Master being of opinion, that the answer was insufficient, an exception was taken to the report.

Attorney General [Sir John Scott], for the exception, cited *Sweet v. Young*, Ambl. 353 ; *Gethin v. Gale*, there cited ; and *Jacobs v. Goodman*, 3 Bro. C. C. 448, n. ; where the partnership was denied.

Solicitor General [Sir John Mitford,] for the Report. In the cases cited it was not necessary, that the discovery should be made. The right to stand at all in a Court of Equity was utterly denied. It was stated, that the person making the claim had no debt or no legacy ; and therefore had no right to investigate the transactions of that executor. Here is a dealing between the Plaintiff and Defendant ; which is the question in the suit. Supposing, it is not a dealing by commission, the Court would think it necessary to know the value ; and the best criterion, generally speaking, is to know the price paid by the Defendant for the pictures delivered by him to the Plaintiff.

LORD CHANCELLOR [LOUGHBOROUGH]. The price given is no criterion of the value of any commodity : but especially not upon a dealing in pictures. I should open every tradesman's books in London, if I was to compel this account upon the allegation, that he was dealing by commission. The answer positively denies the species of dealing, that would entitle you to an account in the real cost of the pictures. Till you establish that, I should think it very dangerous. The question upon a partnership has been decided in the case of *Sir James Cockburn v. Sir Lawrence Dundas* ; where the Defendant denied the partnership.

Allow the exception (1).

1. WHERE a plaintiff's right to an account depends upon the establishment of a preliminary fact, there, although the defence is made by answer, and not by plea or demurrer, still if the previous fact, which alone could entitle the plaintiff to an account, be denied, the defendant need not answer with respect to such account ; for the spirit of the general rule, guiding the present practice, which holds, that "where a defendant answers he must answer fully," seems not applicable to such a case, unless the account is so mixed up with the other questions as to be incapable of clear separation therefrom. *Hall v. Noyes*, 3 Brown, 489 ; *Peacock v. Peacock*, 16 Ves. 52 ; *Phelips v. Caney*, 4 Ves. 107 ; *Jacobs v. Goodman*, 2 Cox, 282 ; *Sweet v. Young*, Ambl. 354. A defendant, however, who objects by answer to setting forth an account, or giving a discovery, must confine himself to such a short answer as will put the question of the plaintiff's right at issue upon some

(1) It is now settled, that this defence must be made by plea, see the note, *ante*, vol. i. 294.

single point; his answer must contain a clear, positive, unequivocal averment; it must not be argumentative, nor must it select particular parts of the inquiry to which it may be convenient to reply. See note 2 to *Jerrard v. Saunders*, 2 V. 187, where the proposed new regulations on this head are also stated: a defendant who pursues such a course as that last described, will, by the present practice, be compelled to answer fully. *Shaw v. Ching*, 11 Ves. 305; *Rouse v. Teed*, 15 Ves. 377; *Somerville v. Mackay*, 16 Ves. 389.

2. When a bill, brought by a creditor or legatee of a person deceased, against an executor or administrator, prays in the alternative, that the defendant may admit assets, or may set out an account; if the defendant admits assets, he is not obliged to set out an account. *Agar v. The Regent's Canal Company*, Coop. 215; *Pullen v. Smith*, 5 Ves. 23. And where a plaintiff's claim, against the estate of a person deceased, depends upon the previous adjustment of the balance of cross-demands, it has been held, that when the executor disputes the foundation of the bill, and contends that, upon a settlement, a balance will appear due to the estate of the deceased, the executor need neither admit sufficient assets, nor set forth an account of such assets as are in his hands, by way of schedule to his answer. *Phetips v. Caney*, 4 Ves. 107. But where a bill is brought against an executor for discovery of assets to answer a bond, or specific debt, there, the executor must give the discovery, although he denies the validity of the demand. *Randal v. Head*, Hardr. 188. For, where the creditor's claim is supported by the *prima facie* evidence of a security, there is less inconvenience in compelling the executor to give a discovery whether he has or has not assets, than in permitting him to withhold it, upon the mere strength of his own denial of what purports to be the act of another. *S. C.* and *Sweet v. Young*, Ambl. 354; *Shaw v. Ching*, 11 Ves. 304.

TALLEYRAND v. BOULANGER.

[1797, JUNE 30.]

INJUNCTION against securities obtained by one French Emigrant against another by arresting him, when about to sail on the expedition against France, and under an obligation entered into in France as surety, which according to the laws of France could not affect the person. (a)

Under the circumstances of this case a Court of Law would discharge on common bail, [p. 449.]

MR. ROMILLY showed cause against a motion in dissolving the injunction against proceeding at law upon the coming in of the answer.

Upon the bill and answer the circumstances were these :

[*448] *In 1778 the brother of the two Plaintiffs was appointed Bishop of Autun in France; and having upon that occa-

(a) It seems doubtful whether this decision, pronounced with so much warmth by Lord Loughborough, can be maintained, as the duress under which the securities were obtained renders them nugatory in Equity. See *ante*, note (b) to *Wilkinson v. Stafford*, 1 V. 43. The question recurred as to the nature of the original obligation entered into in France; and although the laws of France did not allow arrest on the original obligation, still it does not follow, according to the later authorities, that the remedy of arrest might not be employed in another country. It seems to be of no consequence, whether the contract authorizes an arrest of the party in the country, where it was made, if there is no exemption of the party from personal liability. Lord Tenterden has said: — "A person suing in this country, must take the law as he finds it. He cannot by virtue of any regulations in his

sion borrowed money from the Defendant, the Bishop as principal, and the Plaintiff the Compté de Perigord as surety, bound themselves in an obligation to pay 70,000 livres by instalments. This obligation was payable to an agent or trustee for the Defendant, or to the person, who should be in possession of it; and was registered by a notary-public according to the law of France. By the law of France the person could not be arrested either upon mesne process or in execution under that obligation. After some payments under this obligation the second revolution took place in France; which ended in the imprisonment and death of the King and the establishment of a Republic. The Plaintiffs and the Defendant then quitted France and came to England; and their property was confiscated. The Bishop of Autun remained there. The Compté de Perigord, being about to sail on the expedition, which took place to the coast of Brittany, was arrested by the Defendant; and upon that occasion in order to procure his release he paid the Defendant 100*l.* in cash; and gave him two bills of exchange for 100*l.* each, payable in two and four months; and he executed a bond, payable at the end of six months after a peace should be concluded between France and England, for the remainder of the debt, calculated at upwards of 1400*l.*, with interest payable in the mean time, as therein stated. Upon this occasion the other Plaintiff first became a surety by joining in these securities. After the first bill of exchange was paid, the Plaintiffs under the advice, they received, refusing to make any more payments, were arrested and held to bail by the Defendant in four actions: upon which the bill was filed for an injunction.

Mr. *Romilly*, in support of the injunction. These securities ought to be set aside. There was no consideration for them; and they were obtained under such circumstances, that a Court of Equity will not sustain them. The Defendant could not sue upon this obligation, as he has done at law. It is different from *Folliott v. Ogden*, 1 H. Black. 123; 3 Term Rep. B. R. 727: where both parties resided in the British dominions, and had the English laws in view in their contract. This is a foreign contract, executed in a foreign country, and according to the laws of that country. This Court will not take notice of the penal laws of a foreign country; but will as to contracts, when called upon to execute the contract. This debt is peculiar: it is the debt, not of the principal, but a

mere surety; with regard to whom there could be no [449]

own country enjoy greater advantages than other suitors here; and he ought not, therefore, to be deprived of any superior advantage, which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to." *De la Vega v. Vianna*, 1 B. & Adolph. 284. See, also, *Whittemore v. Adams*, 2 Cowen, 626; *Willing v. Consequa*, 1 Peters, Cir. 317; *Contois v. Carpentier*, 1 Wash. Cir. 376; *Bird v. Carlat*, 2 Johns. 345; *Wyman v. Southward*, 10 Wheat. 1. The same doctrine has been declared in the House of Lords. *Don v. Lippman*, 5 Clark & Finell, 1. See, also, *Hinkley v. Moreau*, 3 Mason, 88; *Titus v. Hobart*, 5 Mason, 378; *Atwater v. Townsend*, 4 Conn. 47; and Story, Conflict of Laws, § 567-571, where this subject is opened with instructive fullness.

implied contract; who could be bound no farther than the terms of the contract, he entered into; and under that his person would not be liable. Another objection is, that this obligation was payable only to the agent, or the possessor of it: the Defendant does not appear in it. In his answer he says, he revoked the authority of the trustee: but he does not state, that notice was given. I am informed, that the Court of Common Pleas discharged a Defendant upon common bail under similar circumstances; as the person would not have been liable by the law of France.

Attorney General [Sir John Scott] and Mr. *Fonblanque*, for the Defendant. The Plaintiff having entered into a contract of debt, and migrating into this country, the laws of this country must regulate the contract between them; upon which an *assumpsit* would arise. They might have applied to the Court in which the arrest was made: but judging for themselves they chose to settle it upon other terms; therefore there is no equity to set that aside. At least the money ought to be brought into Court.

Lord CHANCELLOR [LOUGHBOROUGH]. I think, the proceeding on the part of the Defendant has been extremely oppressive and immoral. I am not prepared to say, how far this Court will finally give redress: but I will not allow the Defendant to avail himself of an advantage got by duress; which is the sole cause of the new engagement. If it stood upon the original contract, it would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another to give a greater effect to the contract, than it would have by the laws of the country, where it took place. The principal question here is one, that the unfortunate conduct of a great many of these persons has occasioned; who being all afflicted with the same calamity have not humanity enough to have that consideration for each other, all being involved in that common calamity, that has excited great consideration in this country. It is against all conscience and humanity, that the persons, who could not by the original contract, should by their common calamity be enabled to hold each other in durance. It has appeared to me, that it is not out of the power of Courts of Justice in this

country to apply according to the principles of humanity [* 450] the justice of the country in these cases. *I am glad to hear, and I have no doubt about it, that a Court of Law would upon such grounds discharge the Defendant upon common bail. I have a little doubt, how, consistent with the forms of the municipal law of the country, I can stop the action as to the effect of it against the person. Perhaps a Court of Law might find itself enabled to put some check upon the execution: but surely, if it is unconscientious to take the person purely for the purpose of holding that person in custody, it would be very hard, if the equity of this Court could not some way or other reach that person. The Defendant first against all conscience and humanity gets the advantage of holding this person in confinement contrary to the nature of the contract; and in that confinement he gets a new contract executed.

First, as to the money : he had a right to get what money he could : but I cannot suffer these bills of exchange so obtained to have effect. I cannot suffer these actions to proceed : and if I put them upon terms, it would contradict the ground, upon which I proceed. It appears to me, that I shall in all probability set aside these bills.

Let the injunction be continued (1).

No nation executes the *criminal* judgments of another. See, *ante*, note 4 to *Bardley v. Russell*, 3 V. 424. But when foreign judgments, affecting property only, are offered in evidence in the Courts of England, they are admitted as conclusive evidence, and (though they cannot be pleaded in bar) receive the same regard as sentences given in the Courts of Admiralty or Ecclesiastical Courts here. *Gaze v. Bulkeley*, Ridgw. Ca. before Lord Hardw. 267; *Burrows v. Jemino*, 1 Dick. 48; *S. C.* Sel. Ca. in Cha. 70. And the rules which regulate debts, in the country in which such debts were contracted, are observed when they are sought to be recovered in our Courts. It is in every day's experience to recognize the laws of foreign countries, as binding in respect of personal demands. We always import together with their persons, the existing relations of foreigners as between themselves, according to the laws of their respective countries, except, indeed, where those laws clash with the rights of our fellow-subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference. This principle is too well established to bear discussion. *Potter v. Brown*, 5 East, 131.

(1) 1 Jac. & Walk. 417.

MABERLY v. STRODE.

MASTER of the ROLLS for the LORD CHANCELLOR.

[1797, JULY 3, 5.]

LIMITATION over upon the death of a person unmarried and without issue: "unmarried" in its usual sense meaning never having been married, "and" was construed "or" to afford a reasonable construction. (a)

Words of survivorship added to a tenancy in common in a will are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent, (b) [p. 451.]

Real estate devised to be sold and the produce disposed of with the personal, with a power to direct the fund to be laid out in land: no such direction having been given, it was held personal property, (c) [p. 451.]

In Statute 3 W. & M. c. 11, the apparent meaning of the word "unmarried" is, not married at the particular time, contrary to its usual import, [p. 452.]

SAMUEL STRODE by his will, dated the 3d of July, 1771, devised all his real estates, except an estate at Henham in the county of Essex, which he afterwards gave to his son Samuel Strode in fee, and all his personal estate, except what was before specifically bequeathed to his executors and their trustees, their heirs, executors and administrators, in trust to sell the real estate, as soon as might be after his decease; and he directed, that as well the money arising by the sale as all his personal estate, which he desired should with all convenient speed be turned into money, and the whole from time to time be invested in Government or real securities, in trust to pay the dividends and interest to his said son Samuel Strode for life: and after his decease to transfer the principal unto and [* 451] amongst all and every the child and *children of his said son in equal proportions; or if but one, to such only child; if a son or sons, at twenty-one; if a daughter or daughters, at twenty-one or marriage; the interest in the mean time to be applied for their maintenance and education or advancement in the world: "but in case my said son shall die unmarried and without issue or having issue they shall all die before he she or they if a son or sons shall attain the age of twenty-one years respectively or if a daughter or daughters shall attain the age of twenty-one years or be mar-

(a) In order to advance the apparent intention of the testator, in cases of legacies, as well as devises of real estate, "or" may be construed "and." *Horridge v. Fergusson*, 1 Jac. 583; *Thackeray v. Hampson*, 2 Sim. & Stu. 214; *Markhouse v. Markhouse*, 3 Sim. 126; *Mills v. Dyer*, 5 Sim. 435. But this construction was refused in *Langmore v. Brown*, 7 Ves. 124; *Newman v. Nightingale*, 1 Cox, 341; *Gittings v. McDermott*, 2 M. & K. 69. So "and" may be construed "or," as in the present case. *Bell v. Phyn*, 7 Ves. 459. This construction was refused in *Doe v. Cooke*, 7 East, 269; *Doe v. Rawding*, 2 B. & A. 441; *Girdlestone v. Doe*, 2 Sim. 225. See 2 Williams, Exec. 794, 795; *Jackson v. Blansham*, 6 Johns. 54; *Haven v. Sheetz*, 2 Binn. 532; *Holmes v. Holmes*, 5 Binn. 252.

(b) See *Drayton v. Drayton*, 1 Dessaus. 324; *Campbell v. Heron*, Cam. & Norw. 298.

(c) See, ante, note (a) to *Rashleigh v. Master*, 1 V. 201; note (b) to *Walker v. Denne*, 2 V. 170.

ried respectively then and in such case in trust to assign and transfer the principal of such funds and securities unto my nephews William and James Strode and to my niece Cecil Strode in equal proportions share and share alike his her and their issue or the issue of either of them to take their parent's share with benefit of survivorship to my said nephews and niece Provided always and my will and meaning is that in case my said son shall marry he shall have power and I will that my said trustees shall join therein to settle the value of 2000*l.* out of the said principal funds and securities for every 1000*l.* he shall *bona fide* receive as and for the portion and portions of any wife or wives respectively in bar of all dower :” Provided also, that in case his son should be desirous of investing all or any part of the principal in the purchase of freehold lands in England, the trustees should invest the same accordingly, to be conveyed to them upon such trusts or as near as may be directed concerning his personal estate and the funds and securities, wherein he had directed the same to be invested.

The testator died in February 1775, leaving his son Samuel his only child ; who in January 1776 married Grace Caulfield. Cecil Strode died in 1780, having never been married. James Strode died on the 1st of April, 1787 ; leaving his widow Isabella and five children. Samuel Strode the younger never had any issue ; and he died on the 25th of July, 1795, leaving his wife Grace surviving ; and by his will charging his real estate with his debts and legacies and exempting his personal estate, and disposing of his estate at Henham and his shares of the New River Company, he gave all the rest and residue of his real estate whatsoever and wheresoever and of what nature soever to his wife, her heirs and assigns ; and appointed her executrix.

The bill was filed by the surviving trustee and executor of Samuel Strode the elder to have this will established and the rights *of the parties ascertained. The questions were, 1st. [*452] Whether the limitation over was good, the testator's son not having died unmarried ; 2dly. If the limitation over was good, whether the words of survivorship applied to the death of the testator or of his son.

Mr. *Graham* and Mr. *Winthrop*, for Grace Strode. The question is, whether there is a clear necessary inference, that instead of the concurrence of two contingencies the testator intended the gift over to take place upon the single event of his son's dying without issue. Not only the children of his son but his wife also are the first objects of his bounty. It was natural for him to mean to make a provision for these nephews and this niece, if his sons should die both unmarried and without issue. There have been cases, where the Court has seen to a moral certainty, that if the question had been suggested to the testator, he would have provided for it : but that will not do ; *Doo v. Brabant*, *Calthorpe v. Gough*, 4 Bro. C. C. 393, 395. 4 Term Rep. B. R. 706. The common sense of

the expression, "dying unmarried" is dying without a wife at the time of his death.

Solicitor General [Sir John Mitford] and Mr. Campbell, for William Strode; Mr. Mansfield and Mr. Steele, for Isabella, widow and administratrix of James Strode; Mr. Grant and Mr. Richards, for his younger children; and Mr. Anstruther and Mr. Alexander, for his eldest son. There are various cases for construing the word "and" "or" and *vice versa*: *Jackson v. Jackson*, 1 Ves. 217 (1). Unless that construction is made, the latter words as to his dying without issue have no meaning; for that is the necessary consequence of dying unmarried. The common sense of the word "unmarried" is never having been married; and the Court will not construe it against its common sense without absolute necessity.

MASTER OF THE ROLLS [Sir Richard Pepper Arden]. In the Statute upon settlements, 3 William & Mary, c. 11. s. 7, it is apparent, that the Legislature meant by the word "unmarried" not having a wife at the time: the words are "If any unmarried person not having child or children shall be lawfully hired:" but that is not the usual construction of that word in a will.

[*453] **For the Defendants.* That construction was only adopted upon the clear intention appearing on the act. The testator has expressly directed, what the interest of his son shall be; and there is an anxious provision, that his son's wife shall not take away more of his fortune, than is specified, according to the fortune, she shall bring.

2d Question. For the Defendants Isabella Strode and William Strode. The vesting in these nephews and niece was not postponed, but the enjoyment only; and the benefit of survivorship must be taken to refer to the death of any in the life of the testator; according to *Roebuck v. Dean*, 4 Bro. C. C. 403, *ante*, Vol. II. 265. There is no gift to the issue. In some event not described issue are to take the parent's share: in some other event not mentioned the benefit of survivorship is to take place. Some words must have been omitted to this effect; that if either of the nephews and niece die in the testator's life, then he gives that share to the issue, if any; and if none, with survivorship between them: but there is no inference against the vesting in them, unless they should survive not only the testator but the son. If all the limitations were contingent, and were to remain so till the death of the son, that would defeat most part of the dispositions of the will; the whole of which was intended by the testator to operate from his death, applying to the several persons, who might come into being. The word "then" means in such case, in that event.

For the children of James Strode. The latter part of the clause

(1) *Keilway v. Keilway*, 2 P. Will. 346; *Haws v. Haws*, *Bush v. Dalway*, 1 Ves. 13, 19; *Read v. Snell*, 2 Atk. 645; *Walsh v. Peterson*, 3 Atk. 193, and the cases cited in Mr. Sanders's notes; *post*, *Weddell v. Mundy*, *Turner v. Moor*, vol. vi. 341, 557; *Bell v. Phyn*, vii. 453; 1 Swanst. 330.

is very obscure : but it is certain, that in some event the issue are meant to stand in the place of their parents. It is said to be only, if any of the parents die in the life of the testator. That is confining the words without any thing to authorize it ; for the proviso is general. In *Lord Douglas v. Chalmer*, ante, Vol. II. 505, the Lord Chancellor says, death in the life of the testator is not the natural import of such expressions. The modern cases are contrary to *Lord Bindon v. Lord Suffolk*, 1 P. W. 96. Upon our construction it is not necessary to introduce any words, that are not in the will.

The eldest son of James Strode claimed the property as real estate.

* MASTER OF THE ROLLS [Sir RICHARD PEPPER [*454] ARDEN]. The proviso giving the son in case of his marriage, a power to settle the value of 2000*l.* in bar of dower for every 1000*l.* he shall receive as a portion, is material in the construction of the first part of this clause. It is contended, that according to the strict grammatical construction “and” being a conjunction copulative, the meaning must have been, that unless he died unmarried and without issue, it was not to go over ; and it was insisted, that the word “unmarried” strictly means not married at the time, the gift is to arise ; or if referred to any particular time, it means unmarried at that time ; and that this testator did not mean without having ever been married. I do not know, that the word was ever used in that sense except in the instance, I mentioned, in the statute with regard to settlements ; where the Legislature certainly thought fit to use it in that sense : but there they used it with such additions as put the meaning out of all doubt ; for if it was not used in that sense, the man could have had no child or children. But notwithstanding it is so used there by the Legislature, the question here is, what is the common and usual meaning of it in a will, or the common acceptance of it in language. If legacies or annuities are given to unmarried daughters, which is a very common way, could they go to widowed daughters ? Certainly it never has been so considered ; and, I believe, is not the usual sense, in which testators or persons in common language use it. It must mean such as have never had a husband at all (1). If that is the common acceptance, there is nothing in this will to induce the Court to put an unusual construction upon it. Then how far ought the word “and” to be construed copulative, making the two circumstances necessary to concur. That word is often construed “or ;” and if the word “unmarried” should mean, what I suppose it must have meant in this will, “or” must be meant by the testator. It is frequently so construed to give a fair and reasonable construction to the will ; and I feel no difficulty in construing it so in this case ; because the testator meant by “unmarried” never having been married, and it is

(1) *Bell v. Phym*, post, vol. vii. 453.

necessary to give a fair and reasonable construction. Therefore I am of opinion, the bequest over has taken place.

The other question admits of more doubt: but in the opinion, I have formed upon the words of survivorship, I found myself upon what I thought myself warranted to do in *Perry v. Woods*, ante, 204; where I had occasion to look into all the authorities; and I relied upon *Stringer v. Philips* followed by *Roebuck v. Dean*; which is almost exactly the present case; and there the Lord Chancellor thought himself warranted to follow *Stringer v. Philips*. All the cases were considered in *Perry v. Woods*; and *Brograve v. Winder*, ante, Vol. II. 634, was urged as an authority, that the Lord Chancellor had changed his opinion. I have looked into these cases; rather wishing to found my opinion upon them. *Roebuck v. Dean*, is as near this case as can be. *Lord Bindon v. Lord Suffolk* seems, as the Lord Chancellor said, to have had a very odd fate in the House of Lords. Considering *Stringer v. Philips* recognized by Lord Hardwicke (1) his Lordship thought it safer to adhere to that. It is very true, in *Brograve v. Winder* he was of opinion, the words were such as plainly proved, the vesting was postponed: he gives his reasons: but does not retract what he said in *Roebuck v. Dean*; but founds himself upon the words; from which it plainly appeared, that the time of distribution was the time, to which the words were meant to apply. I followed that and *Stringer v. Philips* in *Perry v. Woods*. This case is very nearly the same as those: perhaps rather stronger; for the life of the son is a very long period; within which it was very likely, every one of these nephews and niece might be dead; in which case there would be a total intestacy; and that is one reason, why it is necessary to adopt, if possible, the construction of the word "survivorship" as applicable only to the death of the testator. The construction, that the benefit of survivorship was to prevent a lapse, and that the interests vested at the death of the testator, is much the most beneficial construction (2).

Upon these authorities I am of opinion, that upon these blind words the safest and soundest construction, best warranted by the authorities, most beneficial to the parties, most likely to be that intended, is, that the meaning is, such as shall survive the testator; and that it is not meant, that it should remain in contingency, and vest only in such as should happen to survive the son with the chance of the whole being lost and a total intestacy occasioned.

I am of opinion, it is personal estate clearly (3): but
[* 456] * according to this determination the children of James are not entitled to any thing.

1. THOUGH the copulative "and" is frequently construed in a will, as if the testator had used the disjunctive "or," when an intention to that effect can be made out; (*Weddell v. Mundy*, 6 Ves. 343;) still, this construction is not to be

(1) 1 Ves. 14.

(2) See the note, ante, vol. ii. 267, to *Roebuck v. Dean*.

(3) See the note, ante, vol. i. 204.

made arbitrarily, nor in any case where it is not absolutely necessary to effectuate the testator's intention. *Turner v. Moor*, 6 Ves. 560; *Fitzgerald v. Lord Fauconberge*, Fitz. Gib. 215, 225; *Montagu v. Nucella*, 1 Russ. 171.

2. In *Bell v. Phyn*, 7 Ves. 458, Sir William Grant concurred with the declaration made in the principal case by Lord Alvanley, that the most obvious meaning of the word "unmarried," is, "without having ever been married;" the word "unmarried," however, may be understood as meaning "not married at the time," if that construction be necessary to make a will operative, and there is nothing on the face of the will clearly showing it was the intention of the testator that it should be taken in the sense which would leave it inoperative. *Doe v. Rawding*, 2 Barn. & Ald. 452.

3. A Court of Equity is never disposed to put such a construction upon a will as would be likely to lead to an intestacy. *Wadley v. North*, 3 Ves. 367; *Booth v. Booth*, 4 Ves. 403; *Crook v. De Vandes*, 9 V. 206; *Bird v. Hunsdon*, 2 Swanst. 345. And this inclination to prevent intestacy is still more strongly felt when it is a residue of personalty which is the subject of bequest. *Leake v. Robinson*, 2 Meriv. 386; *Brown v. Higgs*, 4 Ves. 716. Though even the gift of a residue may have a limited operation, and be restricted to the actual surplus of what the testator had at the time of making his will: very special words, however, are necessary to take a bequest of a residue out of the general rule. *Bland v. Lamb*, 2 Jac. & Walk. 405. But, to be sure, where part of that residue itself is ill given, to that extent the will must be inoperative. *Leake v. Robinson*, *ubi supra*; *Skrjmsher v. Northcote*, 1 Swanst. 570.

EASTABROOK v. SCOTT.

[ROLLS.—1797, JULY 8.]

UPON a deed of composition one creditor was prevailed upon by the debtor to represent his debt below the real amount; receiving notes for the dividend upon the remainder, and bonds for the remainder of his debt beyond the amount of the dividend: upon the bill of the debtor and a creditor, party to the deed, the bonds were decreed to be delivered up: but the Court was of opinion, the Defendant would be entitled to the benefit of the notes, after all the trusts of the deed were satisfied, though not as against the creditors; and directed an inquiry as to that, reserving the question. (a)

Creditor at the desire of his debtor, about to marry, gives in a false account of his demand to the father of the intended wife: after the marriage the creditor is bound even as against the debtor, [p. 461.]

By a deed, dated the 5th of October, 1795, the creditors of Israel Levi agreed to accept a composition for their respective debts in the following manner: viz. as to all but ——— Pearce, 7*s.* 6*d.* in the

(a) In transactions of this sort the utmost good faith is required; and all secret arrangements securing peculiar privileges to certain creditors are void, even against the assenting debtor, or his sureties or his friends. 1 Story, Eq. Jur. § 378, 379, and English cases cited; *Jackman v. Mitchell*, 13 Ves. 581; *Jackson v. Lanas*, 4 T. R. 166. And money paid under such secret arrangements may be recovered back, as it has been obtained contrary to the clear principle of public policy. *Ibid.* *Yeomans v. Chatterton*, 9 Johns. 294; *Wiggin v. Bush*, 12 Johns. 306. And it is immaterial, whether such agreements give to the favored creditors a large sum, or an additional security or advantage, or only misrepresent some important fact. *Ibid.* A similar rule prevails in the law of Insurance, and the first underwriter, whose signature is obtained under a secret agreement, is commonly called "a decoy duck," to induce others to underwrite the policy.

pound by three instalments of 2s. 6d. in the pound, at twelve, eight, and twelve months; the two first instalments being secured by the notes of Mordecai Levi, to whom the effects of Israel Levi were assigned by the deed as a trustee, at four and eight months from the date of the deed. The interest, that Pearce, who was a creditor to a considerable amount, agreed to take under the deed, as a composition for his debt, was a moiety of the surplus after payment of the composition to the other creditors. William Scott and William Stonehewer, partners, being creditors of Israel Levi to the amount of 3431*l.* 15*s.* 9*d.*, executed the deed: but the sum put opposite their names as the amount of their debt was only 1531*l.* 16*s.*; and at the several meetings of the creditors they attended, and represented their debt to be of that amount: but under a private agreement Israel and Mordecai Levi gave them several notes payable in four, eight, and twelve months for different sums amounting in the whole to 7*s.* 6*d.* in the pound upon their real debt of 3431*l.* 15*s.* 9*d.*; and Israel Levi also executed and delivered to them two bonds for the remaining 12*s.* 6*d.* in the pound upon their real debt, payable by instalments. Four of the notes given by Mordecai Levi at four and eight months were paid by him, when they became due, out of the effects of Israel Levi.

The bill was filed by one of the creditors, who executed the deed, and by Israel Levi, against Scott and Stonehewer and Mordecai Levi, praying, that the Defendants Scott and Stonehewer might be decreed to repay to Israel Levi or Mordecai Levi, as trustee in the said indenture, 306*l.* 6*s.* being the difference between the sum received by them out of the effects of Israel Levi and the [* 457] amount * of 7*s.* 6*d.* in the pound upon their scheduled debt, with interest; and to deliver up to Israel Levi the bonds and notes, as having been obtained improperly and fraudulently as against the creditors.

The bill charged, that the proposition for the private agreement came from the Defendant Scott and Stonehewer; and they refused to execute the deed upon any other terms. By their answer the transaction appeared thus. Israel Levi being indebted to them to the amount of 1774*l.* 5*s.* 9*d.* for which he had given his acceptances, a short time before they became due, and a short time previous to October 1795, requested them to supply more goods, assuring them, the bills he had given, should be regularly paid. They furnished more goods accordingly; and shortly afterwards he stopped payment; and to induce these Defendants to agree to the intended arrangement he and Mordecai Levi expressing themselves greatly concerned proposed to secure to these Defendants the deficiency of

Wilson v. Duckett, 3 Burrow, 1361; *Whittingham v. Thornburgh*, 2 Vern. 206; *Sibbold v. Hill*, 2 Dow, 263; Duer, on Representations in Marine Ins. p. 69, 70, 181, note 17. The continental writers employ a different metaphor to denote the fictitious insurer. He is a "dolphin" who leaps from the water that others may follow. Targa, cap. 52, p. 232, *recommande aux assureurs de ne pas agir à l'aveugle, et de prendre garde que les premiers signataires ne soient des Dauphins qui sautent pour faire sauter les autres.* Ibid. 1 Emerigon, ch. 2, § 4, p. 43.

their demand, after the receipt of the proposed dividend, by bonds for securing the payment by instalments, and to give notes to the amount of 7s. 6d. in the pound upon their whole demand; and the Defendants being much pressed by Israel and Mordecai Levi and the solicitor to assent to such proposal, and feeling greatly ashamed at their having been so greatly imposed upon, and desirous of not appearing creditors to so large an amount, and considering themselves not the less entitled to receive their proportionable dividend upon their aforesaid demand, were prevailed upon to execute the deed, as stated; and that Israel and Mordecai Levi executed six promissory notes; the first two of which the Defendants have received: but they have only received on account of the third and fourth 20l. in cash and some canes, by no means sufficient to pay the deficiency; and they positively denied, that they applied to Israel Levi, Mordecai Levi, or any other person, to give them privately a security for their whole debt; or that the arrangement was proposed by them, as stated in the bill; but say, it was proposed by Israel and Mordecai Levi and their solicitor of their own free will. The Defendant Scott told the solicitor at the time, the bonds were delivered, that he considered them as not recoverable at law; as they bore date the same day as the release to Israel Levi; but that the same was an engagement binding * in [* 458] honor only. They denied, that they had any fraudulent intention.

The Defendants at the hearing submitted to deliver up the bonds.

Mr. *Lloyd*, Mr. *Grant*, and Mr. *Pemberton*, for the Plaintiffs, and Mr. *Richards*, for the Defendant Mordecai Levi. There is no difference between these securities. All the creditors coming in under a composition must come in upon the same footing: *Cockshott v. Bennet*, 2 Term Rep. B. R. 763. *Sumner v. Brady*, 1 Hen. Black. 647. *Cecil v. Plaistow*, 1 Anstr. 202. This case has not occurred in specie: but the principles of those cases comprehend it. A man in any transaction, where third persons are concerned, representing his debt otherwise than as it is, is estopped ever after even as against the debtor from insisting, that his debt is greater. The principle of these cases is, that the creditors have it in contemplation to release the debtor absolutely, to make him a new man, and to enable him to enter again into trade for himself. It is not competent to one creditor to defeat that benefit intended for him by the rest of the creditors; and which upon the open, avowed, transaction he would have had. In *Cockshott v. Bennett* the ground of complaint was not, that the other creditors would be injured by paying the Plaintiff his full demand; for they would have received the composition, they meant to receive: but their ultimate intention was defeated: they did not proceed upon a fair view of the subject: *non constat*, what they would have done, if acquainted with the transaction. Every other creditor came into this arrangement upon the supposition, that these Defendants were creditors for 1531l. 16s.: and they were the first, who signed the deed. Upon the statement of his af-

fairs the creditors judged, what surplus would be left to set him up in business again. These cases consider all the creditors as contracting parties with each other. The Courts mean upon principles of public policy to shut out all underhand agreements. There are many analogous cases. *Smith v. Bromley*, Doug. 670. *Jackson v. Duchaire*, 3 Term Rep. B. R. 551. *Jackson v. Lomas*, 4 Term Rep. B. R. 166. *Neville v. Wilkinson*, 1 Bro. C. C. 543, which went upon the general ground, that the plaintiff was estopped even against the debtor; *Scott v. Scott* (1) in the Exchequer; where the Plaintiff being indebted to his mother, and being about to marry, represented himself as *not indebted; and his mother upon being spoken to by the father of the lady did not disclose the debt: she afterwards sued her son; and he was held not liable.

It may be objected, that there is a defence at law; but this Court has a concurrent jurisdiction in such cases: *Bosanquet v. Dashwood*, For. 38, *Brandon v. Johnson*, ante, Vol. II. 517. *Cecil v. Plaistow*, 1 Anstr. 202. So in *Law v. Law*, For. 140, upon a bond for procuring an office; and the cases upon marriage brokerage bonds and advantages taken of young heirs. Besides, no doubt it is proper to come here to have a note, which is negotiable, delivered up (2); and against the trustee, who has taken upon himself to do this act under a private agreement.

Mr. Piggott and Mr. Hubbersty, for the Defendants Scott and Stonehewer. There was no objection to delivering up the bonds; and the bill was not necessary for that purpose. Eastabrook cannot have any interest. It is no part of the object of the bill to set aside the deed. All the cases have been, where the Plaintiffs came here seeking the benefit of secret securities destroying the equality with the other creditors. Can the principles of those cases apply to this case: where the debtor states, that he owes the debt, and the creditor has received no more than the other creditors? I agree, if third persons can be shown to have been injured, it would be vain to deny the principle: but it must be qualified. Israel Levi can complain of no injustice. The relief sought would reverse the first principle of justice; that a man shall pay his debts and complete his contracts. What becomes of the principle, that no man shall take advantage of his own wrong? The dividend upon the remainder of the debt continued an obligation upon Levi. Can a debtor come into Court, and desire not to pay him, whom he represents as a *bona fide* creditor, equally with the rest? If the whole debt had been brought forward, the dividend must have been reduced. *Neville v. Wilkinson*, and *Scott v. Scott* are upon a plain principle, that does not reach this case. The representation of the creditor influenced and guided the contract upon marriage: and afterwards in direct opposition to it a suit is instituted. The father

(1) 1 Cox, 366.

(2) *Newman v. Milner*, ante, vol. ii. 483.

and family of Neville had an essential interest. Pearce ought to be before the Court: his absence is suspicious.

MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN.] There must be relief upon this bill. The bonds must be delivered up; and the Defendants must be restrained from proceeding upon the notes, till it can be known, whether the trust can be carried into execution, so that all the parties shall receive what was intended for them. It is impossible to deny, that the bonds were a fraud upon the creditors. The Defendants admit it: then, why did they not in their answer offer to deliver them up? They shall not retain them, when they admit, and the principles of the Court are, that it is impossible to retain them. Both Levi upon principles of public policy and Eastabrook as a creditor in the deed have an interest upon that.

As to the other point, I think, it is new. I perfectly subscribe to the cases cited: but I am very much inclined to think, they will not stand in the way of the Defendants: though I do not choose to determine it at present. I will first know, whether the trusts of the deed are satisfied, and whether any surplus remains. I am clearly of opinion, that till the other creditors are paid the composition upon their scheduled debts, the Defendants are not entitled to receive a dividend upon any thing beyond their scheduled debt. The only doubt is, whether after payment of the composition upon all the scheduled debts they shall be permitted to receive the composition upon their debt beyond the scheduled debt. The rights of the parties are, that all the creditors had a right to receive 7s. 6d. in the pound; the Defendants receiving that upon 1531l. 16s. only. Pearce also had a right under this agreement, reckoning their debt only at that sum, to a moiety of the surplus: which he chose in preference to the dividend. They had a farther right, that no creditor should receive his whole debt, or be in a better situation with respect to his debt than the other creditors. That has been so often determined, that it is impossible not to say, it is the equity, that every creditor had. The policy, upon which these cases have proceeded, is very proper: but I have great doubts, whether the equity will be sufficient to shield Israel Levi from this gross fraud by prevailing upon a creditor to join in this transaction. It is said, this is a middle case: a creditor admitted to be *bona fide* entitled to above 3000l. without any injury *to the par- [*461] ties, without any intention of fraud, but merely in order to conceal the circumstance of the extent of his demand, consents to put himself down at only 1500l.; is there any policy, after all the other creditors are paid their full composition, to permit Levi to set up this gross fraud upon his part? I think, I shall pause much, before I hold, that the policy goes to the extent of permitting him to set up such a rule in such a case. It would extend the principle beyond any of the cases. *Neville v. Wilkinson* and the other cases of that kind are very distinguishable. There *Wilkinson* without any fraud, but merely to make *Neville's* situation appear better, at

his desire gave in a false account of his demand. Mr. Robinson's intention being to set his son free from all demands, that pressed him, permitting the creditor after the marriage to sue would be to undo the object of the inquiry. It was absolutely necessary to give the *particeps criminis* relief, or you injure other parties. The father would marry his daughter to a man, whom he supposed worth 20,000*l.* but who in reality was worth only 10,000*l.*

It appears to me, that Pearce's trust is not satisfied. He has a right to insist upon what he agreed for, before the Defendants receive the composition upon the remainder of their debt beyond the sum in the schedule.

Therefore let the bonds be delivered up to be cancelled ; and let the Master take an account of all the effects conveyed to Mordecai Levi as trustee, and inquire, whether the several trusts of the deed are satisfied : and it appearing, that the Defendants Scott and Stonehewer have been paid the full composition upon their scheduled debt of 1531*l.* 16*s.* let them be restrained from putting in suit the promissory notes, till the account is taken, or till farther order : but if it shall appear, that after satisfaction of the several trusts of the deed except as to Israel and Mordecai Levi there shall be sufficient to pay the composition upon the debt admitted to be *bona fide* due to the said Defendants, reserve the question, whether they shall be entitled to the benefit of the said notes till after the report ; and reserve the costs (1).

1. In the case of a composition, if one of the creditors, before executing the deed, obtain from the insolvent security for the residue of his demand, by refusing to execute until such security be given, that security is void in law, because it is a fraud upon the rest of the creditors. *Jackson v. Davison*, 4 Barn. & Ald. 695 ; *Wells v. Girling*, 1 Brod. & Bing. 452. This doctrine was established in Equity before it was recognized by Courts of Law. *Jackman v. Mitchell*, 18 Ves. 586 ; *Constantein v. Blache*, 1 Cox, 287 ; *Fawcett v. Gee*, 3 Anstr. 910 ; *Middleton v. Lord Onslow*, 1 P. Wms. 768. The principle is, that in such cases each creditor must act openly. As the other creditors may have been induced to come into terms upon a belief that all were to be on the same footing, any private agreement, for greater benefit to one, is a fraud upon the rest, and therefore void. *Leicester v. Rose*, 4 East, 380 ; *Steinman v. Magnus*, 11 East, 393 ; *Mausson v. Stock*, 6 Ves. 300 ; *Sadler and Jackson, ex parte*, 15 Ves. 55 ; *Lewis v. Jones*, 4 Barn. & Cress. 511. But, though a creditor may have obtained a preference in contemplation of an intended deed of composition, which preference would clearly be fraudulent against other creditors under that deed, still, it was held, in the case of *Wheelwright v. Jackson*, 5 Taunt. 116, that, if the composition should go off, the securities given with that improper view may be retained against a commission of bankruptcy subsequently issued, and not contemplated at the time of the preference. It is to be observed, however, that *Wheelwright v. Jackson* was not the case of an action brought by the holder of the securities given with the purpose above stated, but was an action of trover to get back the instruments, or their value ; to which instruments, being in his possession, the defendant had at least as good a title as the plaintiff, or rather a better, upon the principle, that when both parties are "*in pari delicto, potior est conditio possidentis*." The case cited, therefore, is substantially distinguishable from that of *Wells v. Girling*, 1 Brod. & Bing. 453, where it was determined, that the holder of a note given to secure a preference to one

(1) *Post, Mausson v. Stock*, vol. vi. 300 ; *Palmer v. Neave*, xi. 165, 535, 6, and the note ; *Ex parte Sadler*, xv. 54 ; *Dalbiac v. Dalbiac*, xvi. 116, 125 ; 3 Ves. & Bea. 111 ; 1 Jac. 67.

creditor, in contemplation of a composition, could not recover thereon, although the composition did not take effect. Upon one of the *dicta*, however, which fell from the Court in the course of the judgment delivered in *Wheelwright v. Jackson*, it was observed, in *Wells v. Girling*, that, if an agreement of the nature alluded to is fraudulent, it is void in its creation; and that it is difficult to understand how it can cease to be void, and be rendered valid by subsequent circumstances.

2. As a general principle, a composition is not binding upon a creditor, unless its conditions are strictly fulfilled. *Rose v. Rose*, Amb. 332; *Ex parte Bennet*, 2 Atk. 527; *Leigh v. Barry*, 3 Atk. 584. But, an equitable consideration of the interests of other compounding creditors, may make it reasonable to relieve against the legal consequences of non-payment of an instalment to one creditor, on the very day it became due. *Mackenzie v. Mackenzie*, 16 Ves. 374.

3. That a third person is bound to make good (even at the suit of a *particeps criminis*,) his representations, on the faith of which a marriage has taken place, see, *post*, note 2 to *Ainslie v. Medlicott*, 9 Ves. 13.

BARCLAY v. WAINWRIGHT.

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[ROLLS.—1797, JUNE 23; JULY 6.]

THE rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence and the circumstance, that all the legatees by the first instrument were legatees in the second, except those who were dead, or had quitted the testator's service. (a)

Slight circumstances are laid hold of to get rid of the rule, that a legacy to a creditor extinguishes the debt: but a little difference between a portion and a legacy to a child as to the time of payment will not prevail against the presumption of satisfaction, (b) [p. 466.]

LATHAM ARNOLD having made his will, dated the 15th of March, 1777, added the following disposition bearing the same date and attested by the same witnesses:

"A codicil to be added and taken as part of the last will and testament of me Latham Arnold of Newgate Street, London, tobacco-conist. I give and bequeath to the Reverend Mr. Picard 20*l*. and to the Reverend Mr. Deane and Mr. Taylor 10*l*. a-piece for mourning; and I direct the said legacies to be paid immediately after my

(a) 2 Williams, Exec. 925, and cases cited; *Strong v. Ingram*, 6 Sim. 197; *Fraser v. Byng*, 1 Russ. & M. 90; *De Witt v. Yates*, 10 Johns. 154; *Ricketts v. Livingston*, 3 Johns. Ca. 101. See also, *ante*, note (a) to *Moggridge v. Thackwell*, 1 V. 464.

(b) Where a person indebted bequeaths to his creditor a legacy, equal to or exceeding the amount of the debt which is not noticed in the will, Courts of Equity, in the absence of any intimation of a contrary intention, have adopted the rule, that the testator shall be presumed to have meant the legacy as a satisfaction of the debt. 2 Roper, Legacies, by White, 37, ch. 16. But this rule, though long well established, has frequently been disapproved, upon the ground that a satisfactory reason cannot be assigned, why the testator should not have intended a benefit to his creditor beyond the amount of his debt, in those cases where there has not been a deficiency of assets. *Ibid.* where the cases and distinctions on this point are considered. See also, *post*, p. 516, note (c) to *Hinchliffe v. Hinchliffe*; *ante*, note (a) to *Richardson v. Elphinstone*, 2 V. 463. As to the ademption of legacies to children, see, *ante*, note (1), *Ellison v. Cookson*, 1 V. 110.

decease; and I give to Joseph Deane my clerk 200*l.* provided he continues in the service of my executors, till my affairs are settled, over and besides what may be due to him at my death, and the salary he may be allowed by my executors; and I give to William Hailston my footman mourning and 100*l.*, to James Beckford my coachman mourning and 40*l.*, and to Elizabeth Holmes mourning and 100*l.*, the money legacies to be paid to the said William Hailston, James Beckford, and Elizabeth Holmes, if they shall respectively continue in the service of my family one year after my decease; and I give to my maid-servant Martha Norton 5*l.* for mourning and 20*l.*, and to each of my three other maid-servants, who shall have been in my service two years at my death, 5*l.* a-piece for mourning, and if they shall severally continue in the service of my family one year after my decease, 10*l.* a-piece; and I give to George Gamon my gardener 5*l.* for mourning and 10*l.* to be paid him immediately after my decease: and I give to Mary Brown of Warwick lane an annuity of 20*l.* during her life, to be paid her quarterly in neat money, and I give to Peter Stevenson the elder and Thomas Stevenson 20*l.* a-piece, if they respectively shall continue in the service of my family one year after my decease: and I give to William Priest 10*l.* if he shall continue in the service of myself or my family two years after the date of my will; and I give to Miss Careless of Birmingham 100*l.* to be paid immediately after my decease; and to Mr. Goodman of Deptford 50*l.*, and if he shall die in my life-time, I give the said 50*l.* to his present wife; and I give to Mr. Goodman's eldest daughter 20*l.*, and I give to Mr. Seale of Macclesfield 50*l.*, and if he shall die in my life-time, I give the [*463] last-mentioned 50*l.* to his present wife; and to *his son, who is in partnership with him, 50*l.*, and to the widow of the late William Taylor of Stratford-upon-Avon 20*l.*, and to Richard Smith of Deptford 40*l.*, and I give to Mary Hewson of Oundle 20 guineas for a ring; and I give to Mrs. Hanson and Richard Robinson 10*l.* a-piece; and to John Barratt, John Topp, James Stalion, and to the man called Jack, who works at my mills at Mitcham, 5*l.* a-piece, if they shall respectively be in my service at the time of my decease; and I direct all the last-mentioned legacies to be paid immediately after my death; and I give to John White and Peter Jessup mourning; and I also give them 10*l.* a-piece, if they shall respectively continue in the service of my family one year after my death."

Codicil, dated the 7th of December, 1778, attested by two witnesses: "A codicil to be added to and taken as part of the last will and testament of me Latham Arnold of Newgate Street, London, tobacconist, bearing date the 15th of March, 1777." After several directions relative to carrying on his trade for the benefit of his grandchildren, the testator proceeds thus: "Also I give to the Reverend Mr. Brown of Hampstead, the Reverend Mr. Taylor, and the Reverend Mr. Deane of Huddlescough, 10*l.* a-piece for mourning; and to Mrs. Sumner and Mrs. Nelson 20 guineas a-piece for mourning;

which legacies I direct to be paid immediately after my decease. I give to Joseph Deane my clerk (who is now in my service at 100*l.* a year) the sum of 10*l.* for mourning, and direct the farther annual sum of 100*l.* to be paid to the said Joseph Deane so long as he shall continue in the service of my executors and the said Martin Pearkes, besides his present salary; which annual sums of 100*l.* and 100*l.* to the said Joseph Deane I declare ought to be, and it is my intention should be, paid in the first place out of the profits of the trade at large, before any division is made of the profits thereof; and I give to Mr. Samuel Waterman 100*l.* in addition to the legacy given him by my will. I give to Mr. Miles Penfold 20 guineas for mourning. I give to William Hailston my footman 5*l.* for mourning, and also 100*l.*, and to James Beckford my coachman 5*l.* for mourning and also 45*l.*, and to Elizabeth Holmes 5*l.* for mourning and also 100*l.* and all my linen apparel; and to my maid-servant Martha Norton 5*l.* for mourning and also 45*l.*, and to my now cook at Hampstead 5*l.* for mourning and also 15*l.*, and to William Priest my other footman 5*l.* for mourning and also 10*l.*, and which legacies to my said servants are only to be paid to them, provided they are in my service at the time of my *death; and I [*464] give to my two other maid-servants 10*l.* each, provided they shall have lived in my service three years previous to my death; and I give to George Ganon my gardener 5*l.* for mourning and 30*l.* I give to Mary Brown of Warwick-lane an annuity of 20*l.* during her life, to be paid her quarterly in neat money; and I give to Peter Stevenson the elder and Thomas Stevenson 30*l.* a-piece if they shall respectively continue in the service of my family after my death; and I give to Miss Careless of Birmingham 100*l.*, and to Mr. Goodman of Deptford 50*l.*, and if he shall die in my life-time, I give the said 50*l.* to his present wife; and I give to Mr. Seale of Macclesfield 50*l.*, and if he shall die in my life-time, I give the said 50*l.* to his present wife; and I give to John Smith of Brickhill 75*l.*, and to his son, who is in partnership with him, 75*l.*, and to the widow of the late William Taylor of Stratford-upon-Avon 20*l.*, and to Richard Smith of Deptford 50*l.*, and I give to Mary Hewson of Oundle 20 guineas for a ring; and I give to Mrs. Hanson and Richard Robinson 15*l.* a-piece; to the man called Jack, who works at my mills at Mitcham, 10*l.*, which three legacies last-mentioned are to be paid provided such legatees are respectively in my service at the time of my death; and I give to Peter Jessup 5*l.* for mourning and also 30*l.* if he shall continue in the service of my family after my death; and I give to John Bate of Sandhouse near Brickhill 50*l.*;" then after a disposition of some stock the testator added, "and in all other respects, which is not varied or altered by this codicil, I ratify and confirm my said will."

Samuel Waterman was one of the executors; and a legacy of 600*l.* was given to him by the will. The bill was filed to have the trusts of the will carried into execution; and the question was, whether the legacies given by the codicil, dated the 7th of Decem-

ber, 1778, to the several persons, who were legatees under the former instrument, were additional, or were substituted for the legacies given by that instrument?

Mr. *Lloyd* and Mr. *Richards*, for the Plaintiffs, and Mr. *Graham* and Mr. *Finch*, for the legatees, referred to *Allen and Callow*, (*ante*, 289) and the cases there cited, as to the general rule, that legacies to the same persons by different instruments are additional, subject to be controlled by the internal evidence, that a mere substitution [*465] was intended. As to the particular circumstances of these instruments the Plaintiffs observed, that the legacies were given for the same cause in both, and that the particular direction for accumulation in favor of *Waterman* afforded a strong inference against it as to the rest. The legatees relied on the difference of the legacies by the two instruments to *Deane* and *Miss Careless*. Mr. *Finch* stated the case of *Foy v. Foy* (1) from the brief; but said, he could find no minute of the decree. By the brief it appeared, that the testator by his will gave to Doctor John Jebb the sum of 200*l.* as a small token of veneration and esteem for his many amiable virtues and great and public spirited exertions: by a codicil dated the 14th of August, 1783, the testator says, "Being uncertain, whether I have remembered certain persons in my will in the manner I wish, I therefore give to Dr. John Jebb the sum of 400*l.*, upon condition I have not left him to that amount by my will;" and he gives much the same reasons: then by an instrument, dated at Caen in Normandy, the 10th of December, 1783, "I do make this as my last will and testament;" then after giving to Brand Hollis, who was his executor by the former will, (2) he says, "I likewise give and bequeath and beg the acceptance of 400*l.* to Dr. John Jebb as a small token and testimony of my friendship."

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN], referred it to the Master to inquire, whether the several persons, legatees by the first codicil, to whom no legacies were given by the second, were dead or not in the service of the testator at the date of the second codicil; and the fact was ascertained in the affirmative.

July 6th. MASTER OF THE ROLLS. The fact, upon which I directed the inquiry, is now ascertained. There is no doubt, that the second codicil is intended throughout and entirely as a substitution. It is now too late to deny, that it is settled, and acquiesced in as a rule of the Court, that *simpliciter* and *prima facie* two different instruments giving legacies, whether of the same or a larger amount, and more particularly of a different species, shall be held accumulative and not a substitution. That was determined in *Hookey v. Hatton*, 1 Bro. C. C. 391, n. and it is too late now to discuss, whether it was a wise determination or not. Great pains were taken in it; and Lord Thurlow in *Coote v. Boyd*, 2 Bro. C. C. 521, considers it as established: but it never was established as more than [*466] a *prima facie* rule. *Coote v. Boyd* must determine this

(1) See 1 Bro. C. C. 393, n.

(2) A blank was left for the sum.

case; and is not near so strong as the argument, that this codicil is a mere substitution. Upon the circumstances of that case and the evidence resulting from a comparison of the two instruments Lord Thurlow was clearly of opinion, the second was not accumulative. What is the evidence in this case as to the intention in the second codicil? What the testator calls a codicil to his will, bearing date the same day, seems little more than additions to his will. He gives several legacies for mourning and rings, and to servants. By the codicil of 1778 he gives legacies to every person, to whom he had given legacies by the former instrument, except such as had died, or ceased to be in that character, with respect to which he had given them legacies. The second codicil gives the same or greater legacies to all except Deane; and the same reason is given, and the same object stated. As to rings and mourning, he gives them in both. But what is very strong and decisive is, that Waterman had a legacy by the will, not by the first codicil; and in the second codicil a legacy is given to him in addition to the legacy by the will. If the first codicil operates, it is as part of the will. Then could he have meant every one of the others as additions? As to the different circumstances of the legacies, the ingenuity of the Counsel could not attach upon any instance except as to Deane and Miss Careless. There they have found some circumstances of difference. It has been argued, that an annuity cannot be a substitution for a legacy from the different nature of the interests. The only difference in the legacies to Miss Careless is, that one is directed to be paid immediately after his death. Such a slight difference has never prevailed, as applied to legacies: when applied to debts, it has been scrutinized strictly, in order to get rid of what I call a very absurd rule, that a legacy is considered as meant to extinguish a debt (1). With regard to children it has been over and over decided, that a little difference between a portion and a legacy as to the time of payment shall not prevail against the presumption of an intended satisfaction (2). That single slight circumstance of difference in these two legacies, both pecuniary, is not sufficient to prevent what I conceive to be the clear result of the two codicils taken together; and I lay considerable stress upon this; that where the testator meant addition, he has expressed it. Therefore I think myself warranted, as Lord *Thurlow thought in *Coote v. Boyd*, to hold the second codicil a substitution for the other.

As to *Foy v. Foy*, it clearly appears, there never was any decree in it. No such is to be found in the Register's Book; and according to the statement from the brief it is impossible, Lord Kenyon could have held it an accumulation; for there is upon the face of it

(1) See *Chancey's Case*, 1 P. Wms. 408, and Mr. Cox's note: *post*, 529; *Carr v. Eastabrook*, 561; *Wallace v. Pomfret*, vol. xi. 542.

(2) See Mr. Sanders's note to *Bellaris v. Ulhvatt*, 1 Atk. 427, and *Hinchcliffe v. Hinchcliffe*, and *Sparkes v. Cator*, *post*, 516, 530; and the notes, *ante*, vol. i. 412, 259.

an evident substitution; therefore that case must not be again cited as any authority bearing upon this point (1).

1. In what cases gifts and legacies by two different instruments shall be held accumulative, and when the latter gift is to be understood merely as a substitution for the former, see, *ante*, notes 2 and 3 to *Moggridge v. Thackwell*, 1 V. 464.

2. That a portion, and even a debt, is satisfied by a legacy of equal, or greater amount, see the notes to *Ellison v. Cookson*, 1 V. 100. The reasonableness of this rule has, indeed, been questioned by Lord King in *Chancey's case*, 1 P. Wms. 410, as well as by Lord Talbot in *Fowler v. Fowler*, 3 P. Wms. 353. And Lord Alvanley not only quarrelled with it in the principal case, but, in *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529, declared it to be "of all others that have been adopted in Courts of Equity, the rule most to be regretted;" still, in the very cases which called forth this disapprobation, the doctrine was considered as too firmly established to be now shaken; and though, when applied to positive debts, slight circumstances are willingly laid hold of, to take the case out of the obnoxious rule, Lord Hardwicke held, that those circumstances must not be looked for *dehors* the will, if the distinctions cannot be deduced from the will itself. *Richardson v. Greese*, 3 Atk. 68. Lord Eldon, however, reluctantly, and after great deliberation, held himself bound, by the preponderance of modern authorities, to admit parol evidence to repel the presumption that a debt was satisfied by a legacy of greater amount, notwithstanding the will itself afforded an inference in favor of that presumption; this must, therefore, be now looked upon as settled. *Wallace v. Pomfret*, 11 Ves. 548.

3. Lord Alvanley's repudiation of the case of *Foy v. Foy* must not, it should seem, be understood as destroying the authority of what was really decided in that case; where, as appears by the report published in 1 Cox, 163, repeated legacies to three legatees were decreed to be accumulative: we learn, however, from a note to *Coot v. Boyd*, 2 Brown, 524, that a fourth legatee admitted one legacy only was intended for him; and, as he submitted to take the same in lieu of the several sums reported in the several instruments, Lord Kenyon, in consequence, declared him to be only entitled to one legacy. Of course, *that part* of the decision of *Foy v. Foy* could not be cited in support of the doctrine of accumulative legacies.

4. Any extraordinary division of profit by the Bank of England amongst the proprietors of bank stock is to be considered as an accretion to the capital; and, if a question arise as between a tenant for life of such stock and a remainder-man, the increased dividend will be held to belong to the tenant for life, but the additional capital must be secured to the remainder-man: see, besides the authorities cited in the principal case, *Clayton v. Gresham*, 10 Ves. 288; *Norris v. Harrison*, 2 Mad. 279; *Hooper v. Rossiter*, 1 M'Clel. 537.

(1) *Ante*, *Moggridge v. Thackwell*, vol. i. 464, and the note, 466.

LANGHAM v. NENNY.

[ROLLS.—1797, JULY 7, 10.]

SETTLEMENT upon marriage of the wife's property only upon certain trusts for the husband, wife, and children; in one event for the husband absolutely; but making no provision for the event, that happened: a resulting trust for the wife, (a)

Power not executed by general words in a will, (b) [p. 467.]

Husband's interest by marriage, in his wife's personal property, *chose in action*, or equitable interest, (c) [p. 469.]

Estate given to such uses as A. shall appoint is a fee, (d) [p. 470.]

PREVIOUSLY to the marriage of Edward Mara and Elizabeth Langham 2500*l.* 4 per cent. Bank Annuities and 1500*l.* Old South Sea Annuities, both the property of Elizabeth Langham, were vested in trustees in trust for Elizabeth Langham, her executors, &c. till the marriage; and after the marriage upon trust to permit Edward Mara during the joint lives of him and Elizabeth Langham to receive to his own use the interest and dividends; and in case Elizabeth Langham should survive Edward Mara, to permit her to receive the interest and dividends for her life: but in case she should die in his life, upon trust immediately after her decease to re-transfer, assign or pay over, to Edward Mara or his assigns the two said several sums with the interest then due for his own proper use and benefit for ever; and immediately after the death of Elizabeth Langham, in case she should survive Edward Mara, upon trust to transfer, assign, pay, apply and dispose of the said two sums and the interest and dividends due or to grow due thereon in such parts, shares and proportions, and at such time or times, and in such manner and form, as Edward Mara by his last will and testament in writing or by any other writing duly executed by him in the presence of two or more creditable witnesses should limit, direct or appoint; and in default of such limitation, direction or appointment, then to and among all and every the child or children of the marriage; equally to be divided among them, if more than one, if but one, the whole to that one. Edward Mara settled no property of his own. There was no issue of the marriage. Edward Mara died the 14th of April, 1795;

(a) Where trusts, created by will or deed, fail in whole or in part; or are of such an indefinite nature that Courts of Equity will not carry them into effect; or are illegal in their nature; or are fully executed, and yet leave an unexhausted residuum, there will arise a resulting trust to the party creating the trust, or to his heirs, and legal representatives, as the case may require. 2 Story, Eq. Jur. § 1196*a*; *Stubbs v. Sargon*, 2 Keen, 255; *Omnancy v. Butcher*, 1 Turn. & R. 260; *Wood v. Cox*, 2 Mylne & C. 684; *S. C.* 1 Keen, 317. In the present case, arising under a settlement of the wife's property, the resulting trust was naturally in favor of the wife; for Equity presumes the settlement to be for her protection. See 2 Story, Eq. Jur. § 984.

(b) See, *ante*, note (b) to *Standen v. Standen*, 2 V. 589.

(c) 2 Kent, Comm. 135-143, and cases cited, (5th ed.)

(d) See *Jackson v. Robins*, 16 Johns. 588.

having made no appointment of the said two sums: but by his will, dated the 3d of April 1790, after general introductory [*468] * words declaring his purpose to dispose of his estate and effects, which he had or was interested in, but without taking notice or affecting to make any disposition of the stock, he gave some small legacies; and he appointed his wife and — Sprott executors. Elizabeth Mara died the 1st of December, 1795; and the bill was filed by her executors, claiming the stock as a resulting trust for her, against Nenny, surviving trustee under the settlement, and against Sprott, claiming as personal representative of Edward Mara.

Mr. Grant and Mr. Stanley, for the Plaintiffs. The will of Mara is not an execution of his power: *Andrews v. Emmot*, 2 Bro. C. C. 297. The cases, where a power has been held to be executed under the general words in a will, are either, where some words are thrown in, which could not be satisfied without the subject of the power, as in *Standen v. Standen*, ante Vol II. 589, where there was no other real property, or where there is something of a description of the property: but if that is to be extended to a case stripped of all those circumstances, a man having a power could never make a will without being held to execute the power. *Hales v. Margerum*, ante, 299, was not the case of a power: but the absolute property was vested.

Mr. Lloyd and Mr. Johnson, for the executor of Mara. According to *Standen v. Standen*, the decree in which has been affirmed in the House of Lords, it is not necessary to recite or refer to the power. The words "interested in" are as strong as "power to dispose of."

Another ground for the Defendant is, that the husband upon the marriage became the purchaser of his wife's fortune. She parted with the whole interest, and took back an express interest. All beyond that is a trust for the husband. He could not reduce it into possession more than by settling it. The settlement therefore distinguishes this from the case of a resulting trust for the wife; as it would have been, if there was no settlement.

Reply. The last argument has never been raised before. The whole object of the settlement is the wife's fortune. The only event, in which it was to be absolutely the husband's, has not happened. The provisions in case of her surviving clearly show, an appointment by him was necessary; and that it is not applicable [*469] to executors or administrators. *It is doubtful, whether under this power he could appoint against the children.

July 10th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The question, I shall first consider, is, whether this property passed under the will of Edward Mara as part of his personal estate; for if it was not part of his personal estate to all intents and purposes, I do not think, upon the cases, it can be held to pass under the power as an appointment. The husband settled nothing; the whole subject of the settlement was her property, It cannot be

contended, that in consequence of the settlement this is part of his personal property. By marriage the husband clearly acquires an absolute property in all the personal estate of his wife capable of immediate and tangible possession : but if it is such as can be reduced into possession by action only either at Law or in Equity, he has only a qualified interest ; such as will enable him to make it an absolute interest by reducing it into possession : but with regard to the former, a *chose in action*, if it does not do so, it will survive to the wife. By *chose in action* I mean a right to be asserted by action at law : but as to that, which must be asserted by suit in equity, as where it is vested in trustees, who have the legal property, he has still less interest : he cannot reach it without application to a Court of Equity ; in which he cannot sue without joining her with him : which perhaps a Court of Law might permit him to do, or at least to use her name without her consent : but a Court of Equity will make him provide for her, unless she consents to give it to him. This is the wife's property conveyed to trustees. If the only provision of the trust was to the husband for life, then to the wife for life, it would certainly have gone to the survivor of the husband and wife. If he had died first, it could not be contended to be his property by the marriage settlement. This settlement not having provided for the event, that has happened, I am clearly of opinion, that as the wife survived, and the husband never executed his power over this property, it is part of her personal estate. To say, this was his absolute property, would be to say, all the words of this deed meant nothing but that after the death of his wife it should be his ; which is said before, in case he shall survive her.

As to the question, whether the will is a good execution of the power, *Andrews v. Emmot* is exactly this case. *Hales v. Margerum* * was not at all upon the question, whether the [*470] power could be considered as well executed by the instrument. I said, whatever was the event of *Standen v. Standen*, though I confess, my opinion is strongly in favor of the judgment, which has been since affirmed in the House of Lords, I thought, it was the property of Elizabeth Tichborne to all intents and purposes, and as great an interest as a *feme covert* could have. The testator meant to give her an absolute interest, and only to guard against its going to the executors of the husband. Approving as I perfectly do, of *Standen v. Standen*, and being much inclined to construe the execution of powers, particularly where they are unconfined, as liberally as may be, I must conform to the rules, that have been laid down in the cases. The Lord Chancellor in *Standen v. Standen* arguing upon *Andrews v. Emmot* and *Buckland v. Barton* shows, how they differ from that case, and why the Courts were right in holding those powers not executed. Upon the rules, that have been laid down, perfectly agreeing with *Standen v. Standen*, and thinking, *Hales v. Margerum* does not affect this question, I am of opinion, this property over which the testator had only a qualified power, was not a fund applicable to the purposes, for which the testator gave

his property to his wife, and that he did not mean to include it under the words "my estate;" and as in the event, that happened, he had only a power over it, it belonged to the wife, as not disposed of, she being the survivor. Therefore declare, that it belongs to the Plaintiffs as her executors; she having been entitled thereto in her own right, as having survived her husband.

I desire not to be understood to shake what I take to be the rule, and, I believe, has been determined; that where an estate is given absolutely, without any prior limited estate, to such uses as a person shall appoint, it would be an estate in fee. Suppose, this was real estate: is it possible to say, the heirs of the wife would have been disappointed? I rather wish, the Court had taken another line in these cases; and had held, that any general words be sufficient to execute such powers: but I am not at liberty to say so (1).

1. THAT, where a husband can reach his wife's personal property by process of common law, the Court of Chancery will not restrain the exercise of his legal right; see the latter part of the note to *Burdon v. Dean*, 2 V. 607; but property belonging to the wife, not actually reduced into the possession of the husband, or taken in execution for his debts, or forfeited by him, (as it may be,) will, on his death, survive to the wife. *Wildman v. Wildman*, 9 Ves. 177; *Nash v. Nash*, 2 Mad. 139; and see note 2 to *Druce v. Dennison*, 6 Ves. 385.

2. That the words which would be sufficient to dispose of a testator's own property, may not be sufficient to dispose of property over which he has a power of appointment, see note 4 to *Standen v. Standen*, 2 V. 589; but that an express recital of the power is not necessary to its execution, see note 5 to *Blake v. Bunbury*, 1 V. 194.

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ROGERS v. KIRKPATRICK.

[1797, JULY 13.]

SPECIAL return to an attachment for not appearing, that Defendant was imprisoned for felony: the Plaintiff must proceed in the usual way by *habeas corpus*. (2)

SPECIAL return to an attachment for not appearing, that the Defendant was imprisoned for three years in the House of Correction at Preston in Lancashire under a sentence for felony.

Mr. Stanley, for the Plaintiff. The Defendant from his situation not being amenable to the practice of the Court, the process ought to issue as upon the return *non est inventus*; and the Court will dispense with his being brought up by *habeas corpus* four times. In *Aylett's Case* the return stating, that he was in Newgate for felony, Lord Thurlow made the order at first; then ordered the Register not to give it out; and finally said, he could make no order; and

(1) See the note, *ante*, vol. ii. 594, to *Standen v. Standen*.

(2) The application for a *habeas corpus* was afterwards refused. *Post*, 573. See the note. [The Revised Statutes of New York have made provisions with regard to the *habeas corpus* to bring up persons in custody. See 1 Barb. Ch. Pr. 61, 278; *Knowles v. Chapman*, 2 Russ. 166; *Davison v. Colling*, *id.* 167.]

the Defendant put in an answer. Upon an application to the Court of King's Bench lately to bring up a person, in custody for High Treason, as a witness, Lord Kenyon refused it.

Lord CHANCELLOR [LOUGHBOROUGH]. How can I possibly take this as a return *non est inventus*? The return distinctly states, where the Defendant is. Lord Thurlow after great consideration refused such a motion. The natural inclination would be to grant the motion. I rather believe, the process is too long: but being established, the general rule must take place. I cannot vary from it in particular cases. You must proceed in the common way. Let him be brought up by *habeas corpus*.

It was observed in *Moss v. Brown*, 1 V. & B. 307, that the principal case shows the difficulty of applying the process for taking a decree *pro confesso* to criminal cases, since the writ of *alias habeas corpus* cannot issue from the Court of Chancery except to the prison of that Court; see also, *Lloyd v. Passingham*, 15 Ves. 179; note 1, to *The Attorney General v. Young*, 3 V. 209; and the note to *Errington v. Ward*, 8 V. 314.

MILDMAY v. FOLGHAM.

[1797, JULY 26, 27.]

UNDER the constitution of the Hand in Hand Fire Office the heir, to whom upon the death of the insured the property, being freehold, descended, cannot have the benefit of the policy without assignment. (a)

By deed entered into in 1696 by the members of a company formed for the purpose of effecting insurances against fire under the title of The Amicable Contributionship or Hand in Hand Fire Office, and by the subsequent rules and orders of the said society, it was expressed, that twenty-four directors were to be annually chosen out of the members or persons insured by ballot; and the directors were to choose trustees from among themselves; and that the lawful acts of the directors and trustees should bind all the members; that the directors should meet twice a year, or oftener, if called by five directors or any number of persons insured to the value of 10,000*l.*; that a person became a member *on [*472] being insured in that office; and that all insurances in that

(a) As a general rule, the benefit of the policy goes to the personal representatives of the insured, unless by some act of the party entitled to the proceeds, they become clothed with the character of real estate. 3 Kent, Com. 376, (5th edit.); *Ellis, Fire and Life Ins.* 81; *Norris v. Harrison*, 2 Mass. Ch. 268; *Columb. Ins. Co. v. Lawrence*, 10 Peters, 507; *Carpenter v. Providence Ins. Co.* 16 Peters, 495. A mortgagee of the property has no right or title to the benefit of the policy, taken by the mortgagor for his own benefit, unless it be assigned to him. But if the mortgagor was bound by covenant or otherwise to insure the premises for the better security of the interest of the mortgagee, the latter will have an equitable lien upon the money due on the policy to the extent of his interest in the property destroyed. *Vernon v. Smith*, 5 B. & Ald. 1; *Neale v. Reid*, 3 Dowl. & R. 158; *Thomas v. Vankaff*, 6 Gill & J. 372; *Carter v. Rockett*, 8 Paige, 437.

office would expire at six o'clock in the evening of that day seven years, on which they were dated; that on the expiration of the property in any house or houses insured, the persons insured might settle their accounts and receive what deposit was due to them from the office; and that on failure thereof such house or houses might be insured by whoever should be possessed of the property; and that assignments of policies should be entered in the office within forty-two days after they should be executed, or else the assignee to have no benefit thereby. By the 34th article of the deed it is declared, that in case of the death of any member, no advantage shall be taken by survivorship: but that the interest of such member so dying shall survive to his executors, administrators or assigns, who shall be possessed of the policy; and by the 36th article it is stipulated, that every thing contained therein shall be binding on all persons taking policies and becoming contributors, their executors, administrators and assigns.

By orders made at two meetings of the society on the 10th of November, 1737, and the 11th of May, 1738, reciting, that every insurance becomes void at the time, when the property of the person or persons insured expires, it was ordered, that on applying at the office and declaring their property in the house or houses insured to be expired, all persons may have their accounts adjusted and the deposit due at that time paid to them; and that in case they do not make such application nor assign their policy or policies to the person or persons having the property of the house or houses insured, such person or persons being possessed of the property may insure the said house or houses in the said office notwithstanding the time, for which the insurance by the former policy or policies was made, be not expired.

According to the said deed of settlement and the subsequent rules and orders, when a person becomes a member, he pays down a gross sum, proportioned to the sum insured, by way of deposit for the whole term of seven years, and a premium upon the sum insured proportioned to the risk; and upon payment of such deposit and premium and subscribing his name to the deed he receives a policy under the hands and seals of three of the trustees: and thereby becomes a member.

[*473] * In May 1789 Judith Tucker duly insured for 1200*l.* at the said office three houses in the city of London, of which she was seised in fee; and a policy dated the 20th of May, 1789, was executed to her in the usual form, stating, that she had agreed to become a member of the society, and had paid 1*l.* 4*s.* as a premium and 6*l.* as a deposit for insuring the premises for seven years from the date thereof, three of the trustees appointed the directors to pay according to the said deed and subsequent rules and orders to the said Judith Tucker, her executors, administrators or assigns, the said sum of, &c. and at the expiration or sooner determination of the policy to repay to the said Judith Tucker, her executors, administrators or assigns, the balance of the deposit; and it was declared, that when

any assignment of the policy is made, such assignment shall be entered in the office books within forty-two days, or else the assignee shall have no benefit.

Judith Tucker died the 25th of November, 1794, having by her will appointed Martha Pinfold executrix. The houses insured descended to the heir at law. The policy was not assigned.

On the 3d of May, 1796, one of the houses was burnt. The directors refusing to pay upon the application of the heir, he filed the bill.

Attorney General [Sir John Mitford,] *Mr. Mansfield*, and *Mr. Stanley*, for the Plaintiff. The question is, whether the executor is not a trustee of all future profits; to be indemnified certainly by the heir against all future loss. There is no provision for the death of the insured. If they mean that by the words "on the expiration of the property in any house or houses insured" it is not an accurate way of expressing themselves. It must mean expiration of the property by time or alienation. It does not follow, that, because the executor is entitled to settle the account and receive the balance, the interest of the party must expire at his death, or that the owner of the real property shall not have the benefit of the insurance through the executor. The person, who has the house, must have the benefit of the policy; which is annexed to the house. Upon the construction of the Defendants there never can be an insurance for seven years (which is the plan of the society, * and to [* 474] be absolute by the terms of the policy) without being liable to be interrupted by the death of the insured, if he dies intestate, or does not give his real property to his executors. The only case upon insurances by this society is *The Sadlers' Company v. Badcock*, 2 Atk. 554.

The Counsel for the Defendants were stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. It is utterly impossible to make the executor a trustee. It seems to me perfectly clear upon the plan of this society, which was formed in 1696, that it is not like the other insurance offices since established; but that it is a personal contract, not connected with the real property, not affecting the real property. No person can have the benefit of the policy but the personal representative; with whom they make up the account; and who is entitled to the dividend. The heir is liable to no loss. He might have come in. He had an opportunity of coming in. The article is very intelligible and consistent. The foundation is a partnership between the different persons insuring each other in a society established upon a contribution; by which they mutually engage to each other to answer all losses, any one of them may incur. You cannot make a partnership for yourself and your heirs: but you may for yourself and your executors. Then it supposes, that the interest in the partnership must be connected with the interest in the property. If it goes from the executors, the persons coming into the property must come into the partnership. If it continues with the executors, no benefit is taken by survivorship; but the interest

survives to the executors. I have a strong recollection, that with regard to this particular insurance office the point has been decided ; though I cannot bring to my mind the case.

The bill must be dismissed with costs.

As a general rule, policies of insurance are not attached to the realty, nor do they in any manner go with the same, as incident thereto, by any conveyance or assignment ; but they are only special agreements with the persons insuring, and their executors or administrators, against such loss or damage as they should sustain. But, of course, by express consent of the insurance office, policies may be assigned, and the benefits thereof transferred. *Lynch v. Dalzel*, 3 Br. P. C. 502, (Fol. edit.)

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READE v. LITCHFIELD.

[1797, JULY 31.]

TRUST term in a will to raise out of real estate several sums ; of which some were secured by the testator's bond and covenant : the intention being to give them as portions out of the land, not as debts or legacies, the personal estate is not applicable. (a)

To exempt the personal estate from debts the intention must be manifest, [p. 477.]

JOHN READE devised all his real estates (except a farm called Holmer) to trustees, to hold to them and their heirs to the use of Thomas Reade and William Vanderstegen for 500 years ; and subject to that term, to the use of his grandson John Reade, son of the testator's son George Reade, for life : remainder to trustees to preserve contingent remainders ; remainder to his first and other sons in tail male ; remainder in the same manner to the testator's daughter Martha and her first and other sons in tail male, remainder to her daughters as tenants in common in tail ; remainder to his son John Reade for life and his first and other sons in tail male ; remainder to his son Thomas Reade for life and after his decease to the heirs of his body ; remainder to his own right heirs.

The trusts of the term were to raise out of the real estate the sum of 2000*l.* to be applied in discharge of a bond entered into by the testator and his son Thomas for the benefit of his son John upon his marriage ; and the testator thereby declared, that the said sum of 2000*l.* so secured by bond together with 2000*l.* which was settled upon his said son John on the first marriage of the testator, and which was paid to his son on his marriage, shall be in full for the portion of his said son John ; and upon farther trust to raise 3000*l.* to be applied in discharge of the sum of 3000*l.* which by the marriage settlement of his son Thomas the testator covenanted

(a) As to the exemption of personal estate, see 1 Story, Eq. Jur. § 572, and cases cited ; *Lupton v. Lupton*, 2 Johns. Ch. 628 ; *Livingston v. Newkirk*, 3 Johns. Ch. 319 ; 2 Williams, Exec. 1201-1219. See, also, note (a) to *Kidney v. Coussmaker*, 1 V. 436.

should be paid within a limited time after his decease ; and it was declared, that the said sum of 3000*l.* together with the sum, which by the said settlement he agreed to pay and had paid to his said son Thomas, shall be in full for the portion of his said son Thomas ; and upon farther trust to raise 5000*l.* to be paid to his daughter Martha within three months after his decease, and 1000*l.* to be paid to his grand-daughter Martha at the age of twenty-one or marriage, with a direction for maintenance ; provided, that if she shall die without leaving issue, before her said portion of 1000*l.* shall become payable, the said portion shall sink for the benefit of the person or persons entitled to the freehold or inheritance of the premises charged therewith.

The testator then gave the farm called Holmer to his daughter-in-law Ann Reade during her widowhood ; * and [*476] after her decease or marriage, or in case she should not release her right to a distributive share of the personal estate of the testator's late son George Reade, he devised the same to the uses expressed concerning the other real estates. As to all the rest and residue of his goods, cattle, chattels, ready money, debts owing, stock in husbandry and personal estate, whatsoever and wheresoever, not before disposed of, his just debts, legacies, funeral and testamentary expenses, being first paid and discharged, he gave and bequeathed the same to his executors Coventry Litchfield and Joseph Mowden in trust for his grandson John Reade, his executors and administrators, till he shall attain twenty-one, and to sell and dispose of the same, as they shall think most conducive to the benefit of the trusts reposed in them, and to place the money arising from the sale at interest for the benefit of his said grandson ; and as soon as he shall attain twenty-one, to pay and deliver all such residue of his personal estate and the interest and increase thereof to his said grandson for his own use ; provided that in case his said grandson shall die before the age of twenty-one without leaving male issue, then he gave all the said residue of his personal estate and all the unapplied interest and increase thereof to his daughter Martha Reade, her executors, &c.

The bill was filed by the testator's grandson John Reade praying an account of the personal estate, debts, &c. and that the personal estate may be declared exempt from the debts and legacies, or such of them as are charged on the real estate in exoneration of the personal estate ; and that a sufficient sum may be raised out of the real estate to discharge such debts and legacies, and that the personal estate may be laid out for the benefit of the infant Plaintiff.

Attorney General [Sir John Scott] and Mr. Stanley, for the Plaintiff. These sums must be raised out of the real estate. They are given as portions out of the real estate ; not as legacies. The 2000*l.* 3000*l.* and 1000*l.* are called portions. The direction, that if the testator's grand-daughter Martha dies, before her portion of 1000*l.* becomes payable, it shall sink for the benefit of those entitled to the

freehold or inheritance of the premises charged therewith, is a strong circumstance.

Solicitor General [Sir John Mitford], Mr. Richards, and Mr. Cox, for the Defendants. The rule as laid down in the note to *Fereyes v. Robertson*, Bunb. 302, has been adopted ever since; that you must find a manifest intent to discharge the personal estate. In *Fell v. Fell* Sir Thomas Sewell prefaced his decree by saying, the personal estate was given as a specific legacy. To exempt it from payments of debts it must be so given. It is extraordinary to suppose, the testator intended the real estate, which he has devised in strict settlement, to be incumbered for the sake of giving his grandson a legacy. He gives the personal estate, his debts and legacies being first discharged. It was never yet held, that because a fund is provided for debts, therefore the personal estate shall be exonerated from that, to which it would otherwise be subject. All the cases, particularly *The Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454, are against the exemption (1). The 2000*l.* and 3000*l.* are unquestionably just debts. The 5000*l.* and 1000*l.* are clearly legacies. The charge upon the real estate only adds a particular security for the payment in all events. *Bromhall v. Wilbraham*, For. 274.

LORD CHANCELLOR [LOUGHBOROUGH.] The sums of 5000*l.* and 1000*l.* could not be sued for in the Ecclesiastical Court.

The cases are very rightly determined; and the rules, they have established, are not to be shaken. No question of that kind arises here. No doubt, the personal estate is not exempt from debts. The single question is, whether these sums occurred to the testator to be classed among his debts, or whether he considered them as a provision for his family. The will consists of two parts: first, a limitation of real estate in strict settlement: he creates upon that a term of 500 years: that term he makes in his contemplation the subject of a settlement in his family. The eldest son had upon his marriage received 2000*l.*: 2000*l.* more his father secures to him by bond. He considers that 4000*l.* as that son's portion; and provides for it out of this term. He does the same as to his son Thomas. He considers both these as the portions, he had settled; not having completely discharged those portions. He then gives 5000*l.* to his daughter Martha, and 1000*l.* to a grand-daughter; and [*478] all these sums he considers *as that distribution of his real property, which he thought fit to make among his family.

Then coming to his personal estate he leaves that as a general fund for his general debts and legacies: but there is an anxiety, that his personal estate shall accumulate for his grandson John Reade at the age of twenty-one: in case he should not attain that age, or leave issue, the testator substitutes his daughter Martha; and there is a very anxious intention, that the accumulation of the personal estate should go to the person, who at the age of twenty-one would take the principal. I have no manner of doubt about the intention. He

(1) See *ante*, *Gray v. Minnethorpe*, 103, the note, 106, and the cases collected by Mr. Cox, 3 P. Will. 325.

neither classes these sums among his debts nor his legacies ; but considers them as the portions of these children. They must therefore be raised out of the personal estate.

As to the cases in which alone exemption of a testator's personal estate from liability to his debts may be established, see notes 2 and 4, to *Hamilton v. Worley*, 2 V. 62, and note 3, to *Brummel v. Protheroe*, 3 V. 111.

JOLLAND v. STAINBRIDGE.

[ROLLS.—1797, JULY 14, 18, 21, 31.]

A REGISTERED conveyance of premises in Middlesex for valuable consideration established against a prior devise not registered ; the evidence of notice, which ought to amount to actual fraud, not being sufficient. (a)

EDWARD JOLLAND, tenant in tail of certain houses in Half-moon-street, and Seven-star-court, Old-street, in the county of Middlesex, under the will of Robert Long, dated the 2d of July, 1731, by indentures of lease, dated the 20th of October, 1785, in consideration of a house having been built on part of the premises by Daniel

(a) The present case turns upon the question of the sufficiency of notice of a prior unregistered conveyance. It is often difficult to determine what circumstances are sufficient to put a party upon inquiry. Vague and indeterminate rumor, or suspicion, is too loose and inconvenient in practice, to be admitted to be sufficient. 1 Story, Eq. Jur. § 400, a. The inference of a fraudulent intent affecting the conscience must be founded on clear and strong circumstances, in the absence of actual notice. The inference must be necessary and unquestionable. 4 Kent, Com. 172, (5th ed.) and cases cited; *Jackson v. Elston*, 12 Johns. 452; *Dey v. Dunham*, 2 Johns. Ch. 182; *M'Mechan v. Griffing*, 3 Pick. 149; *Jackson v. Given*, 8 Johns. 137. Though the cases use strong language in favor of explicit, certain notice, yet it is to be understood that implied or presumptive notice may be equivalent to actual notice. Ibid; *Grimstone v. Carter*, 3 Paige, 421; *Newman v. Chapman*, 2 Randolph, 93. In the United States it is uniformly held, that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property. 1 Story, Eq. Jur. § 403; *Parkhurst v. Alexander*, 1 Johns. Ch. 394; 4 Kent, Comm. 174, (5th ed.), and cases cited; *Johnson v. Stagg*, 2 Johns. 510; *Frost v. Beekman*, 1 Johns. Ch. 298; S. C. 18 Johns. 544; *Peters v. Goodrich*, 3 Conn. 146; *Hughes v. Edwards*, 9 Wheat. 489; *Thayer v. Kramer*, 1 M'Cord, 395; *Evans v. Jones*, 1 Yeates, 174; *Shaw v. Poor*, 6 Pick. 86; *Lasselle v. Barnett*, 1 Blackford, 150; *Plume v. Bane*, 1 Green, 63. And the better opinion seems to be that the registration of an equitable mortgage or title, is notice to a subsequent purchaser, as much as if it were a legal security or title. *Parkhurst v. Alexander*, 1 Johns. Ch. 398, and the cases there cited. But in England the doctrine seems to be settled, that the mere registration shall not be deemed constructive notice to subsequent purchasers; but that actual notice must be brought home to the party, amounting to actual fraud. 1 Story, Eq. Jur. § 402; 4 Kent, Com. 174. And in the United States a deed unduly registered, either from want of a valid acknowledgment or otherwise, does not seem to be notice. Ibid; *Heister v. Fortner*, 2 Binn. 40; *Hodgson v. Butts*, 3 Cranch, 140; *James v. Morey*, 2 Cowen, 246, 296; *Kerns v. Swope*, 2 Watts, 75; *Skultz v. Moore*, 1 M'Lean, 520. But see *Morrison v. Trudeaux*, 13 Martin, where such a deed is said to operate as notice to third persons.

Hands under articles, dated the 5th of May, 1784, and in consideration of a fine of 20*l.* and the rents and covenants entered into and reserved, demised the same ground and newly erected house to Daniel Hands, his executors, administrators and assigns, for sixty-one years under a rent of 10*l.* a-year, payable to Edward Jolland, his heirs and assigns. This lease was registered according to the Statute 20 Anne, c. 7, upon the 27th of October, 1785. By deed poll indorsed upon the lease and dated the 24th of February, 1787, Hands in consideration of 300*l.* assigned to William Loveday; who upon the 18th of January, 1790, in consideration of 300*l.* assigned to John Palmer. Upon the 27th of January, 1790, the premises were put up to auction; and William Stainbridge was declared the best bidder at 270*l.* 18*s.* and paid a deposite of 50*l.* On the 3d of February, 1790, the assignments from Hands to Loveday and from Loveday to Palmer were registered. By indenture, dated the 9th of February, 1790, reciting the sale, Palmer assigned to Stainbridge; under which assignment he was in possession. That deed was registered on the 27th of February.

[* 479] * After the death of Edward Jolland, Sophia Jolland an infant, his only child, brought an ejectment, claiming under the will of Robert Long as issue in tail: but that will not having been registered, the Plaintiff was nonsuited. She then filed the bill; charging notice to Hands previous to the lease, and also to Stainbridge previous to his becoming entitled.

The Defendant by his answer stated, that he purchased the said lease, which together with the said several assignments is in his custody, and which have been all duly registered, at a public sale by auction on or about the 27th of January, 1790, for 270*l.* 18*s.* without any notice from any other person of the existence of any claim in any person whatsoever; and he submitted, that, as he purchased the premises at a public auction for valuable consideration without any notice of the existence of the Plaintiff's title or of the said devise or will, when he paid his purchase money, the same is void. He does not know or believe, and was never informed, that previous to the granting the lease Hands, or the person, to whom it was granted, had any notice; and believes, he had no notice or intimation or reason to believe or suspect, or that he did in fact believe or suspect, that Robert Long had made such will, or that Edward Jolland was entitled under the will as tenant in tail only, or any notice or intimation to that effect: on the contrary the Defendant believes, that he had no such notice or suspicion; since if he had any such notice or intimation, he would not have taken a building lease: but the Defendant positively denies, that this Defendant previous to his paying his said consideration money upon the purchase of the said lease had any notice whatsoever or the most distant intimation to that or the like effect; and he submits, that as Edward Jolland pretended to be seised in fee, and was in possession at the time of executing the lease, and as the lessee and the mesne assignees paid valuable consideration as well as this Defendant, and all the deeds

were registered, and this Defendant had no notice, intimation or suspicion, of the Plaintiff's alleged title or claim previous to the execution of the assignment and payment of the consideration money, or of the existence of any such title as the complainant set up, and having duly paid the reserved rent, and expended considerable sums in improvements, and as the will of Robert Long was not registered, the relief prayed will not be granted.

* The evidence of notice was to the following effect: [* 480] Brayfield, book-keeper to the Defendant Stainbridge, deposed, that the wife of the Defendant about the beginning of 1790 told the deponent in the presence of the Defendant, that Mrs. Jolland (mother of the Plaintiff and now Mrs. Colton) had that day been with the Defendant, and desired him not to have any thing to do with the estate; for that it belonged to her daughter; and the person, who was about to dispose of it, had no right to sell; and the Defendant and his wife asked the deponent, whether he thought the Defendant would be safe in purchasing the estate at an auction: the deponent said, he thought, the Defendant would be safe, if he purchased it at an auction.

Elizabeth Hands, widow of Daniel Hands, stated the lease to her husband; and that he built a dwelling-house; and he and his wife lived in the house; and the deponent from time to time paid the rent on behalf of her husband to Edward Jolland for about a year or upwards; after which she paid it to the agent of Joseph Allen, to whom Jolland had mortgaged it, till the sale to Stainbridge. Hands previous to the lease to him and to the building the house, informed the deponent, that he and Branscombe, a broker, had been to Doctors' Commons, and had there read the will of the person, under whom Edward Jolland claimed the estate; and he and Branscombe were well satisfied with the title. About nine years ago Hands was sentenced to be transported to Botany Bay; where he died. A short time before that sentence Loveday, now deceased, out of friendship to and to secure the estate for the benefit of the deponent procured an assignment from Hands; which was afterwards executed by Hands in Newgate, and executed for the benefit of the deponent; and Loveday never paid any consideration. The deponent delivered the lease to an attorney for the purpose of having the assignment prepared: and the assignment and the lease were afterwards delivered to the deponent, and continued in her possession for some time. She afterwards borrowed of Palmer 17*l.* 17*s.* and delivered the assignment and lease as a security; and about four or five months afterwards, the said 17*l.* 17*s.* then remaining due to Palmer, he prevailed upon the deponent to have the estate sold by auction; and it was sold accordingly at the said house, where the deponent lived, and was purchased by Stainbridge for 270*l.* 18*s.* Hands had expended 300*l.* upon the premises; and some time before the sale, Moorsman told the deponent, he would have given 500*l.*; but four or five months afterwards at a meeting between the deponent, Palmer, Stainbridge, and

Morris, an attorney, the deponent received 70*l.* part of the purchase, and all, she ever got. A day or two previous to the auction Stainbridge came to the deponent's house, and told her, Mrs. Colton (formerly Mrs. Jolland) had been with him and informed him, that the title to the said lease of the said estate was not a good one; and therefore she thought, it would not be right for him to purchase such estate; and that he told her, that if he had a mind to purchase the said estate and run the risk, it was nothing to any one. Previous to the auction the deponent went by Stainbridge's desire with him to the house of Morris; when Palmer produced the lease and assignment; and Morris reading them told Stainbridge, that if he purchased the estate, he (Morris) would indemnify him.

Elizabeth M'Neale deposed, that a few days previous to the sale Anne Jolland called to Stainbridge, as he was passing by the door; and told him, she heard, he was going to purchase the said estate; and therefore thought proper to inform him, that the title thereto was not good; upon which he appeared displeased; and said, Poh, Poh; and went away.

This evidence was confirmed by Samuel Pitt.

Shipman, an auctioneer, deposed, that he was applied to by Palmer in 1789 to sell the estate; but from something, that appeared to him upon reading the deeds, and also from the report, that a good title could not be made, he declined being concerned.

Young deposed, that immediately after the sale he was present at a public house, and read the lease to the parties present; and some doubts arising as to the title, Palmer promised to indemnify Stainbridge.

Anne Colton, mother of the Plaintiff, deposed, that Edward Jolland was in 1785 generally reputed owner as heir in tail under the will of Robert Long. She has heard him say several times, he was so entitled. In 1785 Edward Jolland showed Hands a [*482] *copy of the said will; and he was fully apprised and acquainted with the nature and extent of the title; and in the same year Hands told Jolland, that he had been with Mr. Hussey or Hough to Doctor's Commons, and had seen the said will and was well satisfied with the title.

This deponent then gave the same account as M'Neale and Pitt of her conversation with Stainbridge, when he was passing by the house: and said, that the day after the sale she went to his house; and in the presence of Oliphant told him, that a good title could not be made to the said estate; and added, that as her husband was dead, such estate had come to her child; and therefore she requested that he would not have any thing to do with the same: he said, he would do as he thought proper.

Oliphant deposed, that to the best of his recollection and belief no conversation passed between him and Stainbridge or between Stainbridge and any other person in his presence concerning the estate in question.

Mr. Piggott, for the Plaintiff. Hands, and all who claim under

him, were bound to look to the title of the lessor; and can have no better title than he could give them. The validity and duration of the lease must depend upon his power to grant it; and they who took it were bound to inform themselves of the extent of his power. Every purchaser is bound to look to the title of his vendor; and cannot plead ignorance of that, which, had he looked, he would have known. The fact of the vendor's possession cannot justify the vendee in treating with him as tenant in fee-simple without requiring title-deeds, abstracts, or any other evidence of his title. Either the purchasers have not looked to the title of the vendor, and have not fulfilled the obligation to inform themselves, but have purchased in the dark and at their peril, or they cannot be ignorant of the Plaintiff's title. They do not allege any attempt to inform themselves, and that the information, they sought, was withheld; nor do they offer any excuse. No papers to evidence the title were required. Had the purchaser inquired about the title, the vendor must either have forged a title, or have shown the will, which would necessarily have discovered the Plaintiff's title. If a grantee or devisee in tail by avoiding to register the deed or will creating the entail, and finding a purchaser, who will take a conveyance in fee from him, and register it without looking farther or asking a single * question about his right to make such conveyance, can divest the unborn issue of their title *per formam doni*, the consequences of such a transaction and so new a mode of conducting a purchase are very extraordinary and important. A tenant for life in possession, with remainders to *feme covert*s, infants, or persons not *in esse*, may upon the same principles and by the same means effect the same purpose. Can that be the true construction of the statute? According to this doctrine the tenant in tail or tenant for life in possession has an interest in omitting to register; and by such omission the former can effect all, he could effect by fine and recovery, and the latter, what he cannot effect by any other means. I agree, if two persons derive under the same person, the last deed without notice of the first and registered shall prevail against the first in date not registered. Here the issue in tail claim, not under the vendor, but by a title paramount under the same instrument, which gives him title. If the Defendant meant to protect himself under Loveday and Palmer, he ought to have alleged that he did so, and that they had no notice. He had not done that; and the Plaintiff has made ground enough for an inquiry, whether they are not men of straw, trustees for Hands; and that the Defendant was dealing with them knowing that, and that the sale was for the benefit of Hands and his family. The assignment from Hands to Loveday purports upon the face of it to be three years before the registration, and to be an absolute assignment of Hands' interest. The assignment to Palmer was upon the 18th of January, 1790; and upon the 27th Stainbridge purchased. Both assignments were registered together, subsequent to the purchase, and for the purpose of bolstering up the title, Stainbridge had then

acquired. He cannot put himself into a different situation by any act done subsequent to his purchase with notice; namely, by getting in the prior assignments, and registering those; which he could not do with his own deed. This is not like *Hine v. Dodd*, 2 Atk. 275, one witness fully contradicted by the answer; upon which ground alone the bill was dismissed. *Le Neve v. Le Neve*, 1 Ves. 64. 3 Atk. 646. Amb. 436, was upon the evidence of a single witness, Norton the agent. If this evidence will not do, no evidence will; and there is an end of the equity. It is under the head of fraud, that equity relieves. *Sheldon v. Cox*, Amb. 624, is upon the same principle. Parol evidence was admitted in all the cases.

Mr. Lloyd and Mr. Short, for the Defendant. It is un-
[*484] *fortunate, that the Court has departed from the statute by admitting evidence of notice *alimunde*. It has in fact repealed the statute. But the Court will not now extend that, or hold such loose and desultory evidence as this sufficient. If Hands was a purchaser without notice, Stainbridge may shelter himself under that; though he had notice: *Harrison v. Forth*, Pre. Ch. 51; 1 Eq. Ca. Ab. 331. *Lowther v. Carleton*, For. 187; 2 Atk. 242. No notice is proved against Hands except by one witness, contradicted by the answer (1). In the great case of *Le Neve v. Le Neve* there was no doubt as to the notice: but the question was whether Norton was agent or not; and Lord Hardwicke considers all those cases as depending not so much on notice as fraud; as where the agent buys the estate himself, and registers his own deed, having his employer's deed in his pocket upon a trust to register it. In all the cases there is something of recital in the instrument, something beyond parol evidence, something more than what Lord Hardwicke calls suspicion of notice.

July 31st. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. In this cause the value of the property is not such as to make an issue desirable; and if I am to decide it, I am of opinion, the bill must be dismissed; for it does not appear to me, that the Plaintiff has made out a case to entitle her to the relief prayed. There are a great many suspicious circumstances in this case. One thing is clear: the parties, who sold to Stainbridge, if they sold on their own account, have sold in violation of the trust reposed in them. Nothing is more clear than that. Loveday and Palmer, the two persons supposed to purchase under Hands, were mere trustees for his family; therefore with regard to them, I think the objection of Mr. Piggott to their being interposed as any bar to the relief is well founded. Their registry was with a view to this transaction; therefore I desire to be understood to lay the conveyances to them totally out of the case. Then, laying out of the case the two intermediate conveyances, the question is, how far there was notice, such as this Court holds sufficient against a purchaser for valuable consideration, either to Hands or to Stainbridge himself. It is very clear,

(1) See the note, *ante*, vol. ii. 244.

that Hands, who was convicted of receiving stolen goods, and was transported, assigned this over in consequence of his situation. The witness Mrs. Hands comes in a very extraordinary way to set aside a conveyance, as she says, made in trust for her. The *first question is, whether there is evidence sufficient, that [*485] Hands was perfectly aware, the lessor had only a limited interest. The principal witness is Hands's wife. It is very extraordinary, that she should come; who paid rent for these premises under her husband; and admits, that he having laid out this money assigned, first, to Loveday, but as trustee for her; and then they were assigned to Palmer as a security for a very trifling sum of money, only 17*l.* 17*s.* and she states broadly, that her husband's conveyance to them was only in trust for her, and she states broadly knowledge in her husband of the defect of title; and the way, she makes it out, is, that she says, Hands went to Doctor's Commons, and there saw the will, and was perfectly satisfied with the title. It is almost inconceivable; for if Jolland was tenant in tail, it was the easiest thing, that could be, for him to make a good title. It is almost incredible, that Hands should take a lease for sixty-one years, and lay out money, and see, that Jolland had a very good title, if he chose to make it so. Two other witnesses say, Hands had looked at the will, under which Jolland claimed these premises: but none of them go to the will of Long; which was made in 1731; and which created this intail; and I must suppose, that if Hands did go to Doctor's Commons and saw any will, it was another will. It is impossible not to see, that Mrs. Hands gives this evidence from spite. Whatever the rule may be as to the registration of deeds, it is impossible to let such evidence as this be brought to prove notice upon a purchaser for valuable consideration. I must admit now, that the registry is not conclusive evidence: but it is equally clear, that it must be satisfactorily proved, that the person, who registers the subsequent deed, must have known exactly the situation of the persons having the prior deed; and knowing that, registered in order to defraud them of that title, he knew at the time was in them. I am to suppose upon this loose evidence, that Hands went to Doctors Commons, saw, that it was an intailed estate, upon which the man could make him a good title, and that he chose to commit this fraud upon the issue in tail without getting a recovery suffered and a good title thereby made to him. Therefore there is no sufficient evidence of any knowledge in Hands of any defect of his lessor's title.

If notice was proved against Hands, I will not say, there is not sufficient ground for an issue at least as to the notice upon Stainbridge. *I do not like his manner of swearing him- [*486] self a purchaser for valuable consideration without notice. It is clear, whether he had notice of the Plaintiff's title, or not, he had some intimation of the claim of the Plaintiff. He ought to have declared that in his answer. His sheltering himself under those general words makes me imagine, he thought it sufficient not to have notice at the time of the auction. I agree, it is not sufficient

to prove notice to assert, that some other person claims a title; yet all the evidence given here is of that sort. The Plaintiff's mother was guilty of great neglect in merely telling the Defendant, he would purchase at his peril. She never attended the auction; and never registered this will; of which she says Stainbridge had notice. That would have been a much better way. Then the person purchasing would have had notice, not only of the claim, but what sort of claim it was. I very much doubt, whether that general claim is sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge. If the premises would bear it, I should be inclined to grant an issue: but as it stands, I am of opinion, the bill must be dismissed; but without costs. The Plaintiff is an infant; and may not be bound by the decree. Stainbridge has not made a very honest defence. The grounds, upon which I dismiss the bill, are, first, that there is not sufficient proof of notice to Hands, nor, secondly, to Stainbridge. If the parties wish to have it tried, I would not discourage an application: but I am afraid, it is a hopeless case.

I regret, that the Statute has been broken in upon by parol evidence; and am very glad to find, Lord Hardwicke in *Hine v. Dodd* says, nothing short of actual fraud will do (1).

REGISTRATION of an *equitable* mortgage, upon lands situated in a register county, is clearly not, of itself, presumptive notice to a subsequent *legal* mortgagee, so as to take from him his legal advantage; *Morecock v. Dickens*, Ambl. 680; *Bedford v. Bacchus*, cited *ibid*, and reported 2 Eq. Ca. Ab. 615; *Hodgson v. Dean*, 2 Sim. & Stu. 224; nor will registration of a mortgage of the equity of redemption preclude a third mortgagee from tacking that incumbrance, if he has bought in the first mortgage, provided he had not notice, when he lent his money, of the second mortgage. *Cater v. Cooley*, 1 Cox, 182. But a purchaser is bound by actual notice of a judgment, or other *lien* upon real estate, though such judgment may not have been docketed; for the legislature, by declaring that, in a register county, certain forms should be held to give constructive notice, never intended to sacrifice substance to form, or to have it understood, that (the form being unobserved) actual notice of an incumbrance on an estate should not bind a purchaser, whom constructive notice (from registration) would bind. *Davis v. The Earl of Strathmore*, 16 Ves. 430; *Le Neve v. Le Neve*, 3 Atk. 650; *Bushell v. Bushell*, 1 Sch. & Lef. 100; *Doe v. Allsop*, 5 Barn. & Ald. 147. The doctrine of the principal case, however, namely, that the notice of an unregistered deed must be precise, in order to affect a subsequent purchaser, was confirmed in *Wyatt v. Burwell*, 19 Ves. 439; see, also, *Jones v. Gibbons*, 9 Ves. 411.

(1) *Wyatt v. Burwell*, *post*, vol. xix. 435.

LONG v. BLACKALL.

[1796, JULY 19; 1797, AUGUST 1.]

LEASEHOLD property bequeathed in remainder in trust for a child *en ventre*, if a son, for life; and after his decease for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator: a son being born and dying without issue, the limitation over was established in favor of the next of kin according to the Statute, at the time of distribution. (a)

GEORGE BLACKALL being possessed among other things of a messuage, lands and tenements, in Great Haseley, held by lease from the Dean and Chapter of Windsor, for a term of years, by his will, dated the 23d of April, 1709, gave to John Toovey and *Richard Blackall, their executors, administrators and [*487] assigns, the said leasehold premises, in trust, that they should permit his wife and her assigns to possess the mansion-house during her widowhood, and to receive the rents and profits of the residue of the premises, until she should marry or die, or until one of her sons should attain the age of twenty-one; and from and after the death or marriage of his wife as for and concerning the said mansion-house, and as for and concerning the residue of the said premises from and after the death or marriage of the said wife, or the time, that one of his sons should attain twenty-one, which should first happen, in trust for his son Thomas during his life; and after his decease then in trust for such issue male or the descendants of such issue male of the said Thomas as at the time of his death should be his heir at law; and in case at the time of the death of the said Thomas there should be no issue male nor any descendants of such issue male then living, that the trustees should be possessed of the said premises in trust for the testator's son George Sawbridge during his life; and after his decease then in trust for such issue male or the descendants of such issue male of his said son as at the time of his death should be his heir at law; and in case at the time of the death of the said George Sawbridge there should be no such issue male or any descendants of such issue male then living, then in trust for the child, with which his said wife was then *en ventre*, in case it should be a son, during his life; and after his decease then in trust for such issue male or the descendants of such issue male of such child as at the time of his death should be his heir at law; and in case at the time of the death of such child there should be no such issue male nor any descendants of such issue male then living, or in case such child should not be a son, then the said John Toovey and Richard Blackall, their executors, &c. should be possessed of the said premises in trust for such persons as should then be the legal representatives of him the said George Blackall; and he appointed his wife sole executrix.

(a) As to the meaning of "legal representatives," see 2 Williams, Exec. 820 to 832, and cases cited.

The will, as originally prepared, gave the property to the child, of which the wife should be *encient*, and his issue generally after the decease of the testator's other two children and failure of their issue. It appeared to have been afterwards altered by interlining the word "male" wherever "issue" occurred; and the ultimate limitation originally was, that in default of issue of the unborn

[*488] *son the trustees should be possessed of the premises in trust for "the executors and administrators of my said son Thomas;" those words were struck through with a pen; and the following words were interlined, "such persons as shall then be my legal representatives."

The testator died in June, 1709; leaving his two sons Thomas and George Sawbridge surviving, and his widow *encient* of a son, afterwards born; namely, John Blackall. The widow proved the will. She married Richard Carter; and having survived him died in 1778; by her will appointing her son Thomas Blackall her executor. He was also executor of his brothers George Sawbridge and John; of whom the former died in 1753, the latter in 1754; both without issue. John Toovey and Richard Blackall assigned the premises and delivered up the lease to Thomas Blackall; who died without issue in March, 1786; having by his will, dated the 9th of March, 1784, devised his freehold and copyhold estates to certain uses, and appointed Lord Viscount Parker, James Musgrave and John Blackall, his executors; and having given the said leasehold to the two former in trust for such person or persons, and for such estate and interest, and under and subject to such charges, provisions, powers, restrictions and limitations, as were mentioned concerning the freehold and copyhold estates devised to them; or as near as the nature of the leasehold estate would permit; with a direction to renew the lease from time to time out of the rents and profits thereof.

The lease, which was originally granted in 1708 to the testator George Blackall for twenty-one years, was several times renewed: first, in the names of the trustees John Toovey and Richard Blackall; afterwards in the name of Thomas Blackall.

John Blackall, Philippa Long, Hester Blackall, Ann Blackall, and Elizabeth Blackall, were the next of kin according to the Statute of Distributions (1) of the testator George Blackall at the death of his son Thomas; being the five surviving children of John Blackall, paternal uncle of the testator George Blackall. John Blackall died; leaving his son John Blackall his executor. Ann and Elizabeth Blackall also died; and Hester Blackall was surviving executrix of Ann and administratrix of Elizabeth.

[*489] *The bill was filed by Philippa Long and Hester Blackall; praying, that the new lease may be declared subject to the same uses and trusts as the former lease; and that the Defendants John Blackall, Lord Viscount Parker and James Musgrave,

may be compelled to deliver possession and the said lease, and account for the rents and profits since the death of Thomas Blackall. Two questions arose: 1st, Whether the testator George Blackall intended his personal representatives according to the Statute of Distributions, or under the authority of the Ecclesiastical Court: 2dly, Whether the limitation over was too remote. As to the latter question, when the cause came on for farther directions on the 19th of July 1796, the Lord Chancellor directed a case to be made for the opinion of the Court of King's Bench, stating the disposition as of the legal bequest of a term of years, and inserting the name of the Plaintiff Philippa Long instead of "in trust for such persons as shall then be my legal representatives:" the question was, whether the limitation to Philippa Long was good in the events, that have happened? The Judges by their certificate answered in the affirmative (1).

The cause came on upon the equity reserved.

Solicitor General, [Sir John Mitford] Mr. Grant, Mr. Romilly, and Mr. Bell, for the Plaintiffs. The words "legal representatives" cannot mean the artificial representation granted by the Ecclesiastical Court; for if that was the testator's meaning, the natural way would have been to have given it to his wife as such. He could not mean any casual person, that she might make her executrix, or who might take out administration to her. He could not mean such persons as at his death should be his next of kin; for his wife and sons were obviously those persons: and it is given after the death of all of them. It means clearly representatives at some future time; and that can only be the time of distribution. An anxious intention to keep the property in his family as long as he could is apparent. The probate furnishes decisive evidence; for if he meant his executors, he would merely have inserted the word "my," and have struck out the words "of my said son Thomas." In *Bridge v. Abbot*, 3 Bro. C. C. 224, there was more ground to contend, that the intention was to throw the property into the estate of the legatee and merely to prevent a lapse, not intending *any [* 490] particular representative: but the decision was in favor of the next of kin. In *Evans v. Charles*, 1 Anstr. 128, which seems an extraordinary case, the particular intention was merely to make up the deficiency to the creditors; and there was no intention in favor of any particular representative: but being once given to the creditor it was intended to go according to chance. In the construction of the Statute of Distributions, and 1 Jac. II. c. 17, representatives mean those by the law of nature, not those under the authority of the Ecclesiastical Court.

Attorney General, [Sir John Scott] Mr. Mansfield, and Mr. Graham, for the Defendant John Blackall. The executors of Thomas are in the ordinary sense the legal personal representatives. In the statute cited the word "representatives" does not mean next of kin,

(1) 7 Term. Rep. B. R. 100. See *Thellusson v. Woodford*, post, vol. iv. 227, and the notes.

unless where it means descendants also. Here all the descendants are gone, before the question arises. *Evans v. Charles* shows, that these words must mean the individual, who had the legal right to the property; though not intended by the person, he represents, to take any part of it. They are bound to make out clearly, who are intended. The safest way is to take the words in their legal sense. It would be more clear to say, his heir at law is entitled, than such person as should be his collateral next of kin.

Reply. The Statute of Distributions did consider, that there was a species of representation by affinity besides that granted by the Ecclesiastical Court; as in the direction, that there shall be no collateral representation beyond nephews and nieces.

LORD CHANCELLOR [LOUGHBOROUGH]. I think both the determinations, that have been cited, perfectly right. They show, the words are to be explained according to the subject matter. Have they any meaning, if I take them in the legal sense? I can better tell what was not, than what was, his meaning. It is perfectly clear, referring to a future time he could not mean his legal representatives. He altered a very sensible part of his will; which is vastly strong; for it proves, he thought upon it, and had some decided meaning. His first thoughts were very sensible to give the absolute interest to his son, in case the entail could not take effect. That would have been the wisest thing, he could have done. In making that alteration, which he did with deliberation, not suffering his son to take this remainder after all the particular purposes [*491] were exhausted, * it is quite impossible, he should mean it to vest in his wife, transmissible to those, who should become her legal representatives. It would be too much conjecture to apply the words to an heir at law; particularly upon leasehold property. There is no body, I think, who can take it but the next of kin at the time of distribution (1). He certainly meant to keep it in his blood. He could not mean, that it should be as if he had not disposed of it, clearly (2).

Decreed in fifths: one fifth to the Plaintiff Philippa Long; three fifths to the Plaintiff Hester Blackall; and one fifth to the Defendant John Blackall.

1. As to the different constructions, of which the words "legal representatives" are susceptible, see, *ante*, the note to *Jennins v. Gallimore*, 3 V. 146.

2. Lord Alvanley, [ARDEN], in *Holloway v. Holloway*, 5 Ves. 403, expressed his perfect concurrence with the present decision, and the grounds of such concurrence.

(1) *Post, Holloway v. Holloway*, vol. v. 399; *Jones v. Colbeck*, viii. 38.

(2) *Horsepool v. Watson*, *ante*, 383; *Spink v. Lewis*, 3 Bro. C. C. 355.

SCOTT v. CHAMBERLAYNE.

[1797, AUGUST 1.]

DECREE affirmed.

THIS cause, reported *ante*, 302, came on upon an appeal from the decree of the Master of the Rolls, dismissing the bill.

Mr. *Lloyd* and Mr. *Fonblanque*, for the Plaintiffs. Though the testator has not gone on by the codicil to decide, that in case his grandson shall die under the age of twenty-five without leaving issue, the property shall go according to the will, that must be implied. The codicil meant no other alteration than postponing the possession of the grandson till the age of twenty-five; but did not mean to affect the interest of the grand-daughter, if he died under that age. According to the decree the codicil must be a total revocation of the will. The codicil begins by confirming the will, except as thereby altered. It is impossible to mistake the intention of the will, that if the grandson cannot take, the grand-daughter shall. The Court has gone a great way to effectuate the intention.

The Counsel, in support of the decree, were stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. How does the codicil affect the interest given to the grand-daughter by the will? If the grandson had died under the age of twenty-one, she would have been entitled by the will. I am afraid, I can find nothing either in the *will or codicil, that will give her an interest in the [*492] event of the grandson's dying between the ages of twenty-one and twenty-five. It is an omission. I dare say, you are right as to the intention: but he did not think sufficiently upon it, and has not done it. He confirms the will. By the will she takes, in case the grandson dies, before he attains the age of twenty-one, without leaving issue. By the codicil he declares, the grandson shall not be entitled or come into possession, till he shall have attained the age of twenty-five: but he has repeated nothing with regard to the limitation over to the grand-daughter.

Affirm the decree; and let the Defendants have the deposit.

SEE, *ante*, the notes to S. C. 3 Ves. 302.

PICKERING v. LORD STAMFORD.

[1797, AUGUST 2.—VOL. II. 272, 581.]

THE last decree affirmed.

Neither an heir at law nor next of kin can be barred by any thing but a disposition, [p. 493.]

THIS cause, reported *ante*, 332, and Vol. II. 272, 581, came on upon an appeal from so much of the last decree of the Master of the Rolls, as declared, that one half of so much of the residue of the testator's personal estate as was vested in real securities belonged to the personal representative of the widow of the testator.

Mr. *Mansfield*, Mr. *Graham*, and Mr. *Thomson*, for the next of Kin (1). The words in *Simpson v. Hutton*, as to the daughter are not like the words used in this will, which include every possible claim; and though the words of exclusion as to the widow are as strong as in this case, it does not appear, that any question was agitated as to the widow.

LORD CHANCELLOR [LOUGHBOROUGH]. What right have you to read the will? What right has one next of kin to read the will against another next of kin? You cannot exclude an heir at law or next of kin but by giving to somebody else. If acceptance is the ground, she must have the means of election. Dying before the question arose, she cannot be deemed to have accepted what she did not know of (2).

[*493] **For the next of Kin.* The Master of the Rolls certainly did not decide upon the ground of election. He changed his opinion upon the authority of *Simpson v. Hutton* only. In *Vachell v. Breton* the Court read the will.

Attorney General [Sir *John Scott*], Mr. *Grant*, and Mr. *Richards*, in support of the Decree. It is extremely difficult to support *Vachell v. Breton*, unless it went upon strict technical reasoning applied to the particular words of the will: or it might be said, as there was a will and an appointment of executors, there was no intestacy; and it was of necessity to open the will; as it was only an equity; and from the intention either the equity was to prevail or the rule of law. The widow claims thus: 1st, it is a contradiction to look to the intention: 2dly, if the will could be looked at, it is not sufficient to bar the widow in the events, that have happened. It is in vain to argue from the intention with regard to a case, that happens in contradiction to his intention. It was not the testator's intention to give the next of kin any part of this property; and yet they resort to that to show, how much they are to take. In *Achroyd v. Smith*

(1) The argument in general taking the same course as on the former occasion, a few observations only are selected.

(2) Upon the Master's report no evidence as to her having accepted the provision by the will was stated; except that it appeared by an affidavit, that she lived upon the premises at Dunham Massey till her death.

son, 3 P. Will. 22, and other cases upon undisposed mixed funds (1) the testator means the real estate to be personal, only to effectuate a particular intention: if that fails as to part, it goes according to the nature of the estate. You cannot from an express intention apply any argument to a case, which supposes absence of intention.

LORD CHANCELLOR. If the Master of the Rolls had not entertained different views of this case upon the two occasions, when it was before him, I should have thought, there could be no doubt. If I look at the will, which I ought not, it is perfectly clear upon the will, the intention does not go in favor of the next of kin to prohibit the wife from taking any part of his personal estate; for the intention at the time was to guard, perhaps by unnecessary words, against any person setting up a claim to defeat the purpose of charity, the testator had marked out: but neither an heir at law, nor by parity of reason next of kin, can be barred by any thing but a disposition of the heritable subject or personal estate to some person capable of taking. Notwithstanding all words of anger and dislike applied to the heir he will take what is not disposed of. It is *impossible to make a different rule as to the personal [*494] estate with regard to what is not disposed of. Here is a legal intestacy; for the gift to the charity is void at law. Being a legal intestacy, I am to control the Statute of Distributions. How can the Court possibly do that? I must close the will; and cannot look at it.

With regard to the two cases, the only two upon the subject, I perfectly approve Lord Cowper's decision. It is as exactly in point to this case, as two cases can well bear upon each other. As to *Vachell v. Breton*, I conceive, there was some idea, (and there is something in the cases, which leads to that,) that Courts of Equity had a latitude to refuse to raise a resulting trust against executors, taking the interest at law, in favor of children, upon whom the testator had put so strong a note, describing them as illegitimate. It must be recollected, that the point between executors and next of kin was in some doubt at that time, in 1706. I do not approve of the reversal of the Master of the Rolls's decree. It does not seem a case to be followed.

Affirm the decree (2).

SEE, *ante*, the notes to S. C. 3 Ves. 332.

(1) *Ante*, *Chitty v. Parker*, vol. ii. 271; *Robinson v. Taylor*, vol. i. 44, and the notes.

(2) See the note, *ante*, 332.

WALLIS v. THE DUKE OF PORTLAND.

[1797, FEB. 8, 10; AUGUST 7.]

BILL for discovery, whether the Plaintiffs were not employed by one Defendant, a Peer, as solicitors to present and prosecute a petition on behalf of the other Defendant, complaining of a return of a member of Parliament, and praying, that he might be duly elected: demurrer allowed on grounds of public policy, and because the discovery could have no effect, and principally, because such transaction would amount to maintenance at common law. (a)

Party presenting and attending a petition to the House of Commons cannot by setting up the engagement of another person deliver himself from the expense of his own suit, [p. 500.]

The office of a pleader is not to make a case, but to state it fairly according to his instructions, [p. 501.]

Maintenance justifiable from the privity of the parties in estate, or their connection, as master and servant, [p. 503.]

THE bill stated, that the Plaintiffs were in 1789 employed by the Defendant, the Duke of Portland, to act as his solicitors, and to present on behalf of the other Defendant George Tierney a petition to the House of Commons, complaining of the return of George Jackson, Esq. to serve as member for the borough of Colchester in Par-

(a) Courts of Equity will not lend their aid to a party, seeking a discovery to support an action, which, as in the present case, is against public policy. Story, Eq. Pl. § 566; 2 Story, Eq. Jur. § 1495. So where an action was brought to recover the expenses of entertainments given by the Plaintiff, under an agreement with the Defendant to introduce him to a woman of fortune, with a view to marriage; and a discovery was sought in aid of that action, a demurrer to the bill was allowed. *King v. Burr*, 3 Meriv. 693. Nor will a discovery be enforced, where it would oblige a party to criminate himself, or to furnish evidence for any step in the process, by which a criminal accusation can be sustained. Story, Eq. Pl. § 591, 594; *ante*, p. 368, note (a) to *Franco v. Bolton*. Some illustrations of this rule have grown out of cases of maintenance. Thus, where a bill was brought by the executors of a counsellor at law in England for a sum in gross, agreed to be given to the testator for his advice and services; a demurrer by the Defendant was held good, because if he should answer the bill, it would subject him to the statutes against maintenance, it being against the cause of justice for a counsellor at law to make a contract for a gross sum, to be paid to him upon the event of a cause. *Penrice v. Parker*, Rep. Temp. Finch, 75. See also Story, Eq. Pl. § 319. It will be proper to observe that the case last quoted employs the term "Counsellor at Law." If this term be equivalent to "barrister," it is difficult to understand how any question of fees could arise in England on account of his services, for the fees of the barrister are always the *quiddam honorarium*, and cannot be the subject of an action. The principles of courts of law with regard to maintenance are enforced by Equity, which will not uphold any transaction involving this ingredient. 2 Story, Eq. Jur. § 1049; *Burke v. Green*, 2 B. & Beatt. 517; *Peck v. Peck*, 9 Yerg. 301; *Stone v. Yea*, Jac. 426; *Arden v. Patterson*, 5 Johns. Ch. 44. There is not a little difficulty in determining with satisfactory precision what is maintenance. It is said by Blackstone to be an officious intermeddling in a suit, which no way belongs to me, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. 4 Black. Com. 135; 1 Hawkins, Pleas, b. 1, ch. 86, § 1. See *Harrington v. Long*, 2 M. & Keen, 592; *Prosser v. Edwards*, 1 Y. & C. 496. But a party may purchase the whole interest of another in a matter in litigation, provided he does not undertake to pay any costs, or make any advances beyond the support of the exclusive interest, which he has so acquired. 2 Story, E. J. § 1050. So a *cestui que trust* may lawfully dispose of his trust estate notwithstanding his title is contested by the trus-

liament; alleging, that Tierney had been duly elected; and praying, that he might be declared duly elected. The Plaintiffs in compliance with the direction of the Duke of Portland caused a petition to the effect aforesaid to be prepared and presented; and continued to act as solicitors on the said petition during the whole period,

tee. Neither the common law with regard to maintenance and champarty, nor the statute of 32 Henry VIII. ch. 9, made in aid thereof, apply to a trust estate. *Baker v. Whiting*, 3 Sumner, 476. It is said, however, that it is not strictly maintenance for a stranger to advance money for, or to agree to pay the costs of a suit not yet commenced; for the offence consists in such acts done after a suit is commenced. But Courts of Equity deem such acts as savoring of maintenance; and, therefore, will not enforce any contracts or rights growing out of them. *Wood v. Downes*, 18 Ves. 125; 2 Story, Eq. Jur. § 1048, note. See *Wolcott v. Knight*, 6 Mass. 418; *Everenden v. Beaumont*, 7 Mass. 76; *Swett v. Poor*, 11 Mass. 549; *Brinley v. Whiting*, 5 Pick. 348. There are certain peculiar relations in which maintenance is allowed; as in that of father and son; or of an heir apparent; of the husband of an heiress; of master and servant, and the like. *Ibid.* § 1049. *More v. Usher*, 7 Sim. 384; *Thalimer v. Brinckerhoff*, 3 Cowen. 623. And it has been said that brothers may maintain each other. 11 London Law. Mag. 383. But the more important question is, what degree of interest in the subject in dispute will be sufficient to justify maintenance. All persons who have any interest, whether legal or equitable, in a matter in dispute, are justified in using all legal means of enforcing or supporting their claim, and of consequence may bear the expenses of doing so. A mortgagee, for instance, may expend money in defence of the title to the property on which he has his mortgage, even though no party to the suit. And not only a person who has a direct interest do so, but he who has only a bare contingency, which may possibly never come in esse. *Ibid.* This rule would seem to warrant any party in maintaining another in asserting or defending any claim in which he is ever so remotely interested, provided he be interested in the claim itself, and not merely collaterally in the issue of the suit, as affecting another claim similarly circumstanced. *Ibid.* 384. It would seem that those subscriptions or contributions, which sometimes occur, for supporting the cause of another, as in cases of persons sued for an infringement of a patent, are direct acts of maintenance. It is true the old law lays it down that it is not maintenance to advance money in support of a poor man; but the question arises, who is to be considered a poor man? If the mere fact of a person being in bad circumstances will justify maintenance, it may safely be done in almost every instance. It would seem as if no one could be entitled to the description, unless he was actually a pauper, and entitled to sue as such. See the article entitled Champarty and Maintenance, 11 London Law Mag. 369-387. Champarty is so closely allied to maintenance that the two topics are usually discussed together. The odiousness of champarty also is to be traced to the early law; though it has been recognized by recent decisions. 2 Story, Eq. Jur. § 1048; *Williams v. Protheroe*, 3 Y. & J. 129; *Thalimer v. Brinckerhoff*, 20 Johns. 386; S. C. 3 Cowen. 623; *Thurston v. Percival*, 1 Pick. 415; *Kenney v. Brown*, 3 Ridgw. P. C. 502; *Stanley v. Jones*, 7 Bing. 369; *Cholmondeley v. Clinton*, 2 Jac. & W. 136. A. was proved to have been the agent of a number of proprietors, associated in the purchase of a tract of land, for the purpose of collecting testimony and employing counsel. While a suit concerning the land was in progress, A. agreed with the complainant, as was alleged in the bill, to allow him 640 acres for part of his compensation for his services. Under these circumstances, it was held that it was immaterial whether the agreement was proved or not, as an agreement to pay counsel a part of the property to be recovered, made pending the litigation, was void. *Berrien v. M'Lane*, 1 Hoff. 421. Nor is it legal for a Plaintiff's attorney to stipulate to receive a large sum, as one hundred guineas, besides taxed costs, in case he should recover, and no costs in case his client should fail. *Guy v. Gower*, 2 Marsh. 273. And, according to the English cases, any stipulation out of the usual course of fair remuneration, or even an apparent gift by a client to an attorney pending a suit, is illegal and void; or at least, may in general be set aside in a Court of Equity. 2 Chitty,

which the same was depending; and advanced very considerable sums on account, amounting in the whole to 3407*l.* 11*s.* 6*d.* The petition being determined on or about the 4th of April, 1789, the Plaintiffs delivered their bill of costs to a gentleman, who [* 495] then acted as the confidential friend * of the Duke; and not having received the amount they repeatedly applied to the Duke and to Tierney for the same.

The bill then stated several pretences of the Defendant the Duke of Portland, that he was not indebted to the Plaintiffs; and never instructed them to act as his solicitors, and to present such petition; or to expect, that the expense, which might be incurred in presenting and proceeding upon it, should be defrayed by him; and that he repeatedly, after the petition was presented, declared to the Plaintiffs, that he did not consider himself liable; and in particular, that a gentleman, then his confidential friend, by letter communicated to the Plaintiffs, that the Duke did not consider himself liable to any demand in respect of such petition, and apprised the Plaintiffs, that if they proceeded thereon, they must not look to him for payment of the charges, which might be thereby incurred; and that the Plaintiffs being so apprised did proceed thereon upon the credit of Tierney. In answer to these pretences the Plaintiffs made the following charges.

About the beginning of February, 1789, they were informed by Tierney, that he had just seen the Duke of Portland, and that he

General Practice, 28; *Popham v. Brooke*, 5 Russell 8; *Montesquieu v. Sandys*, 18 Ves. 302; *Wood v. Downes*, Ib. 120; *Wright v. Proud*, 13 Ves. 188. It is notorious, that in many parts of the United States, agreements similar in principle to the several last mentioned, are entered into between counsel and clients, without being regarded as void or penal in their character. It has been said that the old cases with regard to maintenance go farther than would be now sustained by a Court of Equity. *Baker v. Whiting*, 3 Sumner, 476; but see *Swett v. Poor*, 11 Mass. 554. And it may be doubted whether the rigor of the ancient law on the subject has not ceased to exercise a salutary influence. If by the usage of society it has fallen into desuetude, it ought to be abolished. Forestalling, regrating and engrossing are described as offences, at the common law, not unlike in their character, champarty and maintenance; but the success of every merchant is achieved by the constant commission of these offences. Engrossing is described as the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. Long, Sales, 101, 102; 3 Inst. 195; *Rose v. Maynard*, Cro. Car. 231; 4 Black. Com. 158; *Rex v. Waddington*, 2 East, 142, 167.

This subject has occupied the attention of the able Commissioners in England, embracing Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, to whom has been referred the important duty of digesting the criminal laws. Of maintenance the Commissioners observe, there is nothing immoral in the act itself, nor does it constitute any violation of any public or private right. Champarty is said to stand much on the same principles with maintenance, of which, indeed, it is but a particular species. After a careful inquiry into the nature of these two offences they conclude by submitting that "these offences are of too doubtful policy to render their continuance advisable," and on this account decline to make any detailed digest of the law on the subject. See 5th Report of the Commissioners on Criminal Law, 34-39; also 7th Report, 171. In the 7th Report they also recommend the repeal of the law against forestalling, engrossing, and regrating. See 7th Report of the Com. on Crim. Law, 68.

was directed by the Duke to instruct the Plaintiff Troward to present the said petition, and to prosecute the same; and that the Plaintiffs believing the said direction to have been received by Tierney from the Duke did present and proceed on such petition on the credit of the Duke in consequence of such direction. The only intimation, they ever received, of the Duke's not considering himself liable was by a letter, dated the 15th of March, 1789, from a friend of the Duke of Portland to the Plaintiff Troward (set forth in the bill) which after suggesting, that it was material to have a consultation on the state of Colchester with the Duke, Mr. Tierney, the Plaintiff Troward and some other persons, and stating some circumstances, which then prevented it, concluded thus:—"Your very handsome offer to me in your letter, of the 3d instant, is most properly considered: but I am desired to say, that it is impossible to think of putting you to the inconvenience, which accepting it would be attended with to you. As things now stand, it is material, that we should turn our attention to the expense incurred, to that which is likely to be incurred, and to *the probable judgment of the committee in the end. It seems to me, that the sum, which I mentioned to you and Mr. Tierney to be brought in aid of the expense of the petition, must be exhausted; and that it would be unfair to him not to suggest this to his consideration. You and he are better able to judge of every circumstance than any body else; and as my object in obtaining a consultation on the case has been frustrated, I hope you will be prepared to have it considered as soon as possible; in order that no measure may be pursued, which can tend to produce any difficulty about the expense, or to lead to more than Mr. Tierney may think convenient for him to bear."

The Plaintiff Troward being much surprised and alarmed at the conclusion of the said letter showed it to the Defendant Tierney; who expressly declared, that he did not consider himself liable to the costs of the petition; and that he was as aforesaid authorized and directed by the Duke to instruct the Plaintiffs to present and proceed upon it. The Plaintiff Troward answered the said letter; stating, that he had shown it to Tierney; and that it had a good deal alarmed him; as he said, he never intended making any addition to the expense already incurred by him: and that it was understood, that he was not to be at any expense respecting the petition, and reminded the Plaintiff, that he had so informed him in the beginning of the business; and the Plaintiff farther stated, that he conceived the expense incurred at that time to be not less than 1300*l*. The Plaintiffs not receiving any reply proceeded upon the petition; concluding, that if the Duke had intended to withdraw his liability to the costs, he would in consequence of the Plaintiff's letter have declared such intention. The expense then incurred did not exceed 1500*l*. and the Plaintiffs were entitled to be repaid that sum by the Duke, though he had thought proper to withdraw himself from future liability. The Plaintiffs never received any sum on account of their demand except 1000*l*. which they received from Tierney;

and which they have heard and believe he received from the Duke. The Plaintiffs repeatedly applied to the Duke for payment; and he has not complied with their request of payment; though he has in conversation admitted the justice of the same; and on or about the 27th of June, 1789, the Duke in a letter to Tierney says, he has just heard, that some doubts remain in the Plaintiff's mind respecting Colchester, and desires Tierney to refer him to the [*497] letter, *which Mr. A. wrote him with the privity and concurrence of the Duke, or to appoint a meeting; that no misunderstanding may remain respecting that business. The Duke considered himself liable to the whole or part of the expense; and has admitted the same within the last six years; but has requested the Plaintiffs not to prosecute their demand, but to wait some time longer.

The bill then stating, that without a discovery the Plaintiffs cannot make their demand available at law, prayed a discovery with reference to the facts charged; and whether in the communications between them and the Duke the latter did not subsequent to the 15th of March, 1789, refuse to permit the Plaintiff Troward to give his time and attendance without charge; as he could not think of accepting such offer; and whether he did not consider such offer as amounting to an offer to proceed without any person being responsible; and whether by declining it he did not consider, that he entitled the Plaintiffs to charge some persons, and whom, for the personal attendance and diligence of the solicitor.

Both Defendants demurred generally.

Attorney General [Sir John Scott] Mr. Mansfield, and Mr. Pemberton, for the Defendant, the Duke of Portland. A person standing in the situation of this Defendant would not act the part, the public has a right to expect, if from his feelings, and because he could deny the truth of every syllable of this bill, he should do any thing to destroy that protection by demurrer, which upon grounds of public policy is held out to the whole country. 1st. Nothing is stated calling upon the Duke for an answer: 2dly. The transactions are of such a sort, that this Court will not endure them to be stated. This Court would never endure even in the ordinary case of real or personal property a bill stating upon the face of it a case of gross maintenance; a maintenance of such a nature, that a Court of justice cannot interpose to give any protection to the efforts of any persons stating themselves to be concerned in it. It is against a standing order of the House of Commons. Can a discovery be enforced to help them to the expense of enabling a Peer to introduce a man into the House of Commons, who would not undertake it for himself? There are two or three acts of Parliament, the last the 28th Geo. III. c. 52, s. 1, requiring, that every petition shall be [*498] signed by the person presenting it. *There is no writing by the Duke; therefore according to the Statute of Frauds he cannot be charged. The Plaintiffs have not stated, that they have brought or mean to bring an action, or want testimony for it,

because, if it could be tried, it is clear, Tierney is a competent witness to prove the whole of it; which must be the ground of his demurrer. In *Walsh v. The Executors of Lord Clive*, the bill was brought by the candidate himself for the expenses of the Worcester election upon Lord Clive's undertaking to pay: Lord Thurlow treated the cause with indignation.

Solicitor General, [Sir John Mitford], Mr. Piggott, and Mr. Fonblanque, for the Plaintiffs. This is not within any of the acts imposing punishment on maintenance. It is determined, that suits in the Ecclesiastical Court are not within any of those acts. They are confined to suits in the Courts of Common Law, except the Act 32 Hen. VIII. c. 9, which extends to the Star Chamber, the Court of Requests and this Court: *Tisdale v. Bedington*, Cro. Eliz. 594. Hawkins certainly supposes, that the law does not include in the crime of maintenance any suit except in the Courts of Common Law and the extension by the Statute of Hen. VIII.; which is confined to suits respecting lands. This respects, not the election, but the petition; and therefore is not within the resolutions of the House of Commons. These petitions are of recent origin, founded upon an act of Parliament referable to such subjects and very peculiar.

LORD CHANCELLOR [LOUGHBOROUGH]. Without inquiring into the quality of the act, I wish you to state, what could be the consideration in law, that would support the promise. You must state, that the Defendant in consideration, that the Plaintiffs would present and carry on a petition for Tierney, promised to pay the expense. Put this case: a subscription to carry on a petition to the House: I confess, I always thought, there was something of crime in it: but be that as it may, if the subscription was in writing, would an action lie for the money subscribed? Upon the Statute of Frauds a collateral promise to answer for the debt of another distinctly supposes, that there is a debt. The debt must be first raised, before you talk of a collateral promise.

For the Plaintiffs. Immateriality is no objection to the discovery. *Bishop of London v. Fytche*, 1 Bro. C. C. 96. *Hindman v. Taylor*, 2 Bro. C. C. 7. As to the objection from the Statute of Frauds, that would be an objection at law, but not in this stage.

*It might be for a debt to be contracted; for instance, [*499] goods to be delivered. Both interfering in the original transaction, it is too doubtful to bring it within the Statute. The whole proceeding moves from an alleged contract with the Duke. It was the opinion of Lord Thurlow, that the only effect of the Statute of Frauds against a bill for discovery of an agreement was, that if the agreement was denied, it prevented the party from resorting to evidence (1). Tierney cannot be examined as a witness except upon a release.

(1) The Lord Chancellor observed, that he did not quite assent to that. It is not clear, that Lord Thurlow's final opinion was, as it is here stated. In *Whitchurch v. Bevis*, 2 Bro. C. C. 559, the plea was after great discussion finally allowed. In the note, *ante*, page 38, the principal cases upon this subject are collected; and an attempt is made to distinguish the points arising on the Statute.

Reply. The Statutes with regard to maintenance have nothing to do with this: The question is, whether this transaction has not so much of what arises from maintenance in its nature as to make it unfit for this Court to entertain the bill upon grounds of public policy. No one person interested in the election is stated to complain of it. It was a rash conclusion, that if the Duke meant to withdraw his liability, a reply would have been sent to the Plaintiff's letter. That the 1000*l.* paid on account was received by Tierney from the Duke is not made the subject of a direct averment. If this was a case, upon which an action could be maintained, Tierney is a good witness; because the Plaintiffs state upon the record, that they never gave credit to him; and then the allegation, that they cannot make their demand available at law, is not enough. I deny, that this Court does sit to give a discovery, that is immaterial. In *The Bishop of London v. Fytche* Lord Thurlow proceeded upon the idea, that the bond was perfectly legal; if not, it is anomalous. In *Oliver v. Haywood* and *The Mayor of London v. Ainsley*, 1 Anstr. 82, 158, and *Selby v. Crew*, 2 Anstr. 504, immateriality was held a ground of demurrer: and it is so considered in Mitf. Pl. 154. A demurrer lies, where the discovery may subject the Defendant to pains or penalties, or, as the Solicitor General very well puts it, Mitf. Pl. 157, to punishment of any kind. In *Harrison v. Selwin* the ground of the demurrer was, that the discovery would forfeit the Defendant's seat in Parliament. Lord Hardwicke had [*500] no difficulty in taking *notice of the powers of that

House, which exists by the law of the land. Though a matter cannot be brought within the express ground of an act of Parliament, analogy is a sufficient objection here. Marriage-brochage bonds, &c. are not void upon acts of Parliament; nor were they till very lately considered as bad at law: *Collins v. Blantern*, 2 Wils. 341, and another case before Lord Mansfield are the first cases, in which such bonds were held bad at law. In *Harrington v. Du Chattel*, 1 Bro. C. C. 124, Lord Thurlow decided upon grounds of public policy against a bond for the purchase of an office; though not within the Statute 5 & 6 Ed. VI. So agreements to put an end to prosecutions for felony or even fraud are treated the same way upon the same ground. In *Johnson v. Ogilby*, 3 P. Wms. 279, the Reporter attempts a distinction between fraud and felony: but the bill was dismissed.

LORD CHANCELLOR [LOUGHBOROUGH]. It is not from any doubt I entertain, but in order that I may give my opinion more correctly, that I wish to defer it. The point happens not to be entirely new to me; for some years ago there was a case in the Court of Common Pleas, that led me to the topics of argument in this case. It was an action brought by Mr. Shaw for the expenses of the petition against Sir Thomas Beavor for Norwich. The Defence was, and the fact was true, that certain persons, probably electors, had put the Defendant upon petitioning, upon an undertaking, that they would pay all the expenses, and he had nothing to do but to give his at-

tendance ; that they retained Shaw and Counsel. The agent was not the Defendant's agent, and was never employed by him upon an election or any other business. All was communicated to Shaw from time to time and at the beginning. Sergeant Adair was Counsel for the Defendant. Upon my direction to the jury, not doubting the evidence, they found a verdict for the Plaintiff. My direction was founded upon this ; that the party petitioning and attending the petition could not by setting up the engagement of any other person deliver himself from the expenses of his own suit. In that case this circumstance occurred ; that so many as were electors might have a sort of interest in their representative. That led me to consider, in case an action had been brought against them, how far it would be maintained. No application was made to the Court to set aside the verdict. At that time from the value and the novelty of the case I looked a * good deal into it ; in what cases it fell [* 501] directly within the legal description of maintenance ; in what it was against the policy of the law to permit such suits against persons, not the immediate parties. When this cause was first opened to me, I had the grounds of that opinion before me.

All the law books state the offence of maintenance to be, not upon the Statutes, but it is repeatedly said to be *malum in se* ; and those acts, that are acts of maintenance in a suit not subject to particular provisions of the Statutes, are punishable by indictment at the King's suit. I do not mean to go farther into the case now.

Aug. 7th. Lord CHANCELLOR. It is not from any doubt, that I postponed giving my opinion ; but from having mislaid the note, I made very recently after the argument. The bill is only for a discovery without any prayer of relief. It is a proposition of no doubt, that a Court of Equity has no authority to compel a party to answer interrogatories. The *subpœna*, that issues in this Court, must be grounded upon some equity stated upon the bill ; upon which the Court can aid the suit of the Plaintiff by relieving him from some defect of the mode of trial at common law, of which the other party ought not in conscience to avail himself, but which the forms of law would allow. A bill of discovery brought for no specific purpose would at best be impertinent ; probably very mischievous. To such a bill a demurrer is the proper answer. The demurrer grounds itself upon one of two grounds ; either that no case is made, that calls for any answer ; or that upon such case, as is set forth, the Defendant is not bound to discover any circumstances stated ; because they may tend to involve him in penal consequences of the supposed transactions. The present bill, I am extremely glad to observe, is very fairly drawn ; for it states without reserve the instructions laid before the pleader. I take notice of it ; because it is extremely proper, and part of the office of the pleader, fully and fairly without any gloss to state such instructions, as are given him. It is no part of the duty or business of the pleader to make a case ; but only to state it. In the old books it is stated to be commendable in the pleader to say, "*Non sum veraciter informatus ; ideo nihil dicat.*"

There are many passages in Hawkins, where it is very ably discussed, how far it falls within maintenance to state a case with [* 502] more advantage than *belongs to it. That is certainly not the case of the present bill. It is quite obvious, that if all the facts stated in the bill were set forth in an action, the Plaintiff would be inevitably nonsuited. Though that may be in itself a good cause of demurrer, there is a stronger ground; for if the discovery could be material for any purpose, and aid the Plaintiff in bringing forth that case in an action, which is stated in his bill, it is such a case as a Court of Conscience would not permit to be made, or give any aid in bringing it forward.

The case disclosed is of this nature; an undertaking supposed between the Plaintiff and the Defendant, that the latter would contribute to the expense of a petition against the return of a member of Parliament in the whole or a given extent. That is an engagement between two parties to the injury and oppression of a third: in short, it is maintenance; for maintenance is not confined to supporting suits at common law (1). In the first book you open upon the subject (one naturally looks into Hawkins) it is stated to be either *in pais* or by prosecuting suits. Maintenance *in pais* is punishable by indictment. Maintenance by prosecuting suits, without distinguishing what suits, is punishable by an action by the party grieved also; and that is an action at common law. Statutes prohibiting particular species of maintenance add penalties; but it is laid down as a fundamental authority, that maintenance is not *malum prohibitum*, but *malum in se*: that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense. There is no case in contradiction to this. The case cited from Cro. Eliz. proves nothing. It was supposed to prove, that maintenance was not applicable to Courts Christian. It is nothing like that. After declaration it was moved in Court, that the action would not lie. What does the Court do? They put the party to plead or demur. What the Court would have done upon that is not stated. The ground of the objection was, that the action was misconceived, being upon the Statute 1 Rich. II. which gives no action. That Statute only contains particular penalties. An action would lie at common law. I can have no doubt upon that. An action for a malicious suit in the Ecclesiastical Court is commonly and frequently maintained. In the several cases to be found in Anstruther (there are three of them) the Court has always gone upon the idea, that it is impossible to sustain a bill for discovery, the effect of which would be to bring out a case of maintenance. The manner in which it is [* 503] considered *at law, is strongly illustrated in *Pierson v. Hughes*, 1 Freem. 71, 81, which was an action of debt upon bond for money expended and to be expended in the prosecution of that suit. Upon the first argument it was held maintenance; that giving the bond was as great an evil as laying out money.

(1) *Post*, *Stevens v. Bagwell*, vol. xv. 139; *Wood v. Downes*, xviii. 120.

Maynard as *Amicus Curie* stated, that to speak to a counsel or an attorney to encourage the suit, wherein he had no interest, had been adjudged maintenance. Upon the second day the argument took this turn; that as only a bond was given, no maintenance was in fact committed, upon the common maxim "*non officit conatus nisi sequatur effectus.*" The answer of Vaughan was, that a bond given to maintain or kill will be void, though the act never ensue. Atkyns, Justice, was of opinion, that a bond given, while the suit was depending, for what was already expended, was maintenance; because an encouragement to go on with the suit. The result of the cause is immaterial to the argument; because the Court was of opinion, and very properly, that the Defendant was mistaken in demurring, and ought to have pleaded; for there is a justifiable maintenance, arising from the privity of the parties in estate, or from their connection, as master and servant. Therefore there was a possible case, in which that bond might have been available at law; and that ought to have been negatived by plea.

I do not go into the argument, which was very properly urged in support of the demurrer, upon considerations of public policy; because I am of opinion upon the whole of the case, that it is directly stating a transaction of maintenance; praying a discovery of that, which, if the discovery was made, would fall within that specific reprobated offence stated by the common law; that if the discovery was made, it would be *mahum in se*; therefore I am of opinion, it is not fit for a Court of Equity to permit this suit to proceed any farther. Allow the demurrers with costs (1).

1. WHENEVER the effect of a bill for discovery would be to establish a case of maintenance, or illegal combination, or conspiracy, a demurrer will be allowed; *Oliver v. Haywood*, 1 Anstr. 82; *Mayor of London v. Ainsley*, 1 Anstr. 158; *Cousins v. Smith*, 13 Ves. 542; *Claridge v. Hoare*, 14 Ves. 65; and that the offence of maintenance is not confined to suits in Courts of common law, was again recognized in *Stevens v. Bagwell*, 15 Ves. 156, the note to which case see, *post*. The principal case was affirmed, upon appeal, in Dom. Proc.; see 8 Brown's P. C. 161, (Toml. edit.)

2. When a number of persons have a common interest in the same thing by the same title, it cannot be called *maintenance* in them to unite in a defence of that interest; but the agreement to this effect must not be extended to any objects in which they are not jointly interested. *Stone v. Yea*, Jacob's Rep. 434.

(1) Upon appeal to the House of Lords the order, allowing the demurrers, was affirmed with 200*l.* costs, without hearing the Counsel for the Respondents, 5th April, 1798.

WAKEMAN v. THE DUCHESS OF RUTLAND.

[1797, AUGUST 8.—ANTE, 233.]

EXCEPTION, that the persons entitled to the purchase-money, subject to the charges, were not parties to the conveyance, overruled. (a)

THIS case (reported *ante*, 233) came on again upon exceptions to the report of Mr. Smith approving the draft of the conveyance produced by the Plaintiffs.

The question discussed on the former occasion was again raised upon the following exceptions:

1st Exception.—That in the draft of the conveyance the following persons were not named as parties thereto, namely, Lady Mary Eyre, widow of the testator; James Eyre, Charles Eyre, and Arthur Onslow and Mary, his wife, late Mary Eyre.

5th Exception.—That the Master has not in the said draft inserted the usual covenants for the title from Lady Mary Eyre, James Eyre, Charles Eyre, and Arthur Onslow and Mary, his wife; as far as they are respectively benefited under the will of the testator.

6th Exception.—That the Master has not certified, that he has allowed the draft of the conveyance left with him, upon the part of the Defendants, approved by Mr. M'Namara, Mr. Shadwell, and Mr. Cruise.

Mr. *Graham* and Mr. *Sutton*, for the Exceptions. All the conveyancers named in the sixth exception think it reasonable and proper for the trustees to require, that these persons should covenant to the extent of the interests, they take; and they say, it is usual in all cases to execute a covenant for a good title at least from the first purchasing ancestor; for he has the covenant of the person, from whom he purchased; and hands over the deeds to the vendee; who then has the title, the vendor had. Therefore in this case it ought to be notwithstanding any act done by Thomas Eyre or any of his ancestors. *Lloyd v. Griffiths*, 3 Atk. 264, is a precise authority for such a covenant as against the acts of Thomas Eyre. *Fearne's Posthumous Works*, 110, 118. As to the objection from creditors, annuitants and persons unborn, it is no answer, that because we cannot reach the extent of our equity, we cannot stir a step. A covenant is never required from simple-contract creditors. So where [*505] the *Crown enters into a contract, the purchaser knows he cannot have it; and that may be considered in the purchase-money. We only require a covenant in respect of their own interest. Mr. Booth following Lord Hardwicke thought, the covenant ought to reach up to the first purchaser; and if he refused to hand over the title-deeds, he ought to covenant against all the world. A general warranty is not required, but a very limited covenant; and the damages can never go farther than the benefit, they derive under the will.

(a) See 1 Maddock Ch. 605.

The Counsel for the Plaintiffs were stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. No one can have more respect, than I have, for the gentlemen whose names are now mentioned. When I over-ruled the exception, I certainly could not make any order to preclude the same objection from being made to the conveyance. It was not improperly an exception to the title; because they had not made these parties, parties to the suit; therefore it was strictly proper to state, that there were no parties to the cause to be bound by the decree to make up any defect: but it often happens, that parties, who are not parties to the suit, are got to join, before the conveyance is prepared. I do not blame the parties for repeating the objection by making it an objection to the conveyance; for it more formally marks the opinion I entertain. The ground, upon which I decided it, and which I have not heard even in conversation any thing tending in the least to remove, is, that, if this objection is well founded, there never could have been, nor ever can be, any sale of an estate in the Court of Chancery, which is disposed of to trustees upon particular trusts for A. B. and C. and for legacies and for simple-contract debts; for if it is true, that all claiming beneficially ought *pro rata* to enter into a covenant for the title, it is of absolute necessity, that there is no possibility of distinguishing the case of a simple-contract creditor for 20*l.* and a *cestuy que trust* for 20,000*l.* The former is as much under an obligation *pro rata* with regard to his interest to be a party to the conveyance as the latter. The consequence would be, that the estate never could be sold by decree, till the account was taken of all the debts; because before that account was taken, it could not appear, who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled: but it is the constant practice, that there are 500 such decrees, * to sell the estate in the [*506] first instance: of course the title can be made only by the trustees for the sale, without calling in all those parties, who are beneficially interested; and I should feel the great inconvenience, with respect to what has been the course in times past, and in future. With all the respect I sincerely bear to the great knowledge and learning of all the gentlemen named, and convinced as I am of their great ability in that branch of the profession, which they have made their particular study, I cannot alter my own opinion. It will be easy to get a better authority than mine upon it: but at present I retain that opinion, which I gave more at length and with more full discussion of the case than I do now (1).

Over-rule the exceptions. —

See, *ante*, the notes to S. C. 3 V. 233.

(1) Upon appeal to the House of Lords from the decree of 16th July, 1795, referring it to the Master to inquire, whether a good title could be made, and from the orders of the 29th July, 1796, and the 8th of August, 1797, upon hearing the exceptions, the said decree and orders were affirmed, with 200*l.* costs, without hearing the counsel for the Respondents: 22d February, 1798. 8 Bro. P. C. 145.

LIKE v. BERESFORD.

[ROLLS.—1797, August 8.]

SETTLEMENT of the property of a married woman, a ward of the Court, and of all the dividends and interest accrued, directed in opposition to an assignment by the husband for valuable consideration. (a)

SIDNEY HAMILTON was entitled under the will of her grandfather William Rowan, to the sum of 2000*l.* Bank Stock to be paid to her on the day of her marriage, with all the interest due thereon.

Upon the 16th of October, 1780 (1) a bill was filed by Sidney Hamilton, then an infant of the age of fifteen years, by her father and next friend, against James Adair, the surviving trustee, and under an order dated the 7th of November, 1780, the Defendant transferred the sums of 2600*l.* and 780*l.* Bank stock, admitting to be standing in his name on account of the trust, into the name of the Accountant General, in trust in the cause to the account of the infant; and paid the sum of 23*l.* 2*s.* 6*d.* cash, admitted to be in his hands on the same account, into the Bank upon the like trust and to the like account. In the same month of November, Sidney Hamilton eloped to Scotland with Benjamin Beresford; and upon the 11th of December they were married in London. The marriage

The cause coming on for farther directions upon the 28th of July, 1798, a specific performance was decreed with costs. See 4 Cruise's Dig. 93 to 99. Sugd. Vend. & Purch. 396, 7, 8, 5th edit.

(a) As to the right of a wife to a settlement out of her property in the hands of a Court of Equity, see *ante*, note (d) to *Ball v. Montgomery*, 2 V. 191. And assignees take the property of a wife subject to all the equities which affect the bankrupt; and so would be bound to make a settlement upon the wife out of her *choses in action* and equitable interests assigned to them, as the husband would be bound to make one. See 2 Story, Eq. Jur. § 1411, and cases cited: *Smith v. Kane*, 2 Paige, 303; *Mumford v. Murray*, 1 Paige, 620. It is now established that a special assignee or purchaser from the husband, for a valuable consideration, of these interests of the wife, is bound to make such settlement, though it has been said that, subject to such provision, he will be entitled to the interests so assigned, discharged from the title of the wife by survivorship, if she should survive him. *Ibid.* § 1412, note and cases cited; *Purdeus v. Jackson*, 1 Russ. 70; *Honner v. Morton*, 3 Russ. 64; *Kenny v. Udall*, 5 Johns. Ch. 473; *S. C.* 3 Cowen, 500; *Harwood v. Fisher*, 1 Y. & Coll. 112; *Johnson v. Walker*, 1 Jac. & W. 472. It is competent, however, for the wife, at any time pending the proceedings, and before a settlement under the decree is completed, or, at least before proposals are made under that decree, by her consent, given in open court, or under a commission, to waive a settlement: 2 Story, E. J. § 1418, and cases cited. But a female ward of the Court of Chancery, who has married without its authority, and in contempt of it, will not be allowed to dispense with a settlement. On the contrary, the Court, as in the present case, will insist upon such a settlement being made by the husband, notwithstanding her consent to the contrary. And the Court will often, by way of punishment, in gross cases, do, what it is not accustomed to do on common occasions, require a settlement of the whole of the wife's property to be made on her and her children. *Ibid.* 2 Roper, Husband & Wife, ch. 7, § 1, p. 267, 268; *Hodgens v. Hodgins*, 11 Bligh, 103.

(1) The bill was in fact filed on the 4th of November upon intelligence of the elopement of Miss Hamilton, in order to make her a ward of the Court. She was married in Scotland on the 3d of November.

was disapproved by the friends of Mrs. Beresford. Some time after the marriage Benjamin Beresford in the names of himself and his wife brought a bill of revivor and supplement; praying, that in right of his wife he might be declared *entitled [* 507] to the said trust moneys or part thereof; or that a proper settlement might be made.

While the cause was depending Mr. and Mrs. Beresford having a child born, and becoming much distressed, borrowed money from John Robert; and by a deed of assignment, dated the 3d of November, Benjamin Beresford assigned the said Bank stock with other property of his wife's to John Robert, upon trust to receive such part of the fund, as had not been laid out under the decretal order, and to sell the residue; and out of the money arising by the sale to pay himself all sums of money due and become due, and to pay the surplus to Benjamin Beresford, his executors and administrators.

The cause came on to be heard before Sir Thomas Sewell upon the 12th of July, 1782; who ordered it to stand over, that a party might be added. In the mean time Mr. Beresford became indebted to Thomas Like, an upholsterer, for money and goods supplied for the use of him and his wife; and by a deed of assignment, dated the 13th of March, 1783, reciting the interest of Mrs. Beresford in the Bank stock under the will of her grandfather, the proceedings, that had taken place in the Court of Chancery, and the assignment to Robert; and also reciting, that Benjamin Beresford was indebted to Thomas Like in the sum of 292*l.* 3*s.* 6*d.*, and that he had agreed to lend to Beresford the weekly sum of 2*l.* 2*s.* for nine months; for securing which Beresford had agreed to assign the said Bank stock in trust for Like, and such other creditors, as Beresford should appoint, subject to the assignment to Robert; Beresford therefore in consideration of that sum due and the said weekly allowance bargained, sold, assigned, transferred, and set over, to Thomas Like, his executors, administrators and assigns, the said two sums of Bank stock and the cash in the Bank, with all the interest or dividends then due, or which should after become due, upon the trusts aforesaid.

Like paid the weekly allowance according to this stipulation; and continued to advance money from time to time, and paid other tradesmen for necessities for Mr. and Mrs. Beresford, in all to the amount of 790*l.*

* After the decree of the Master of the Rolls in the suit [* 508] upon the bill of Mr. Beresford, which had upon the death of Adair been revived against his personal representatives, Mr. and Mrs. Beresford separated. In 1789, through the mediation of friends, it was settled that the parties should appeal from the decree.

The cause was accordingly brought before Lord Thurlow upon the 3d of March, 1789, when by consent the order of the Master of the Rolls was reversed; and it was declared, that Sidney Beresford became entitled on the day of her marriage, namely, the 11th

of December, 1780, to the said Bank stock and the dividends accrued; and it was ordered, that Benjamin Beresford should lay proposals before the Master for a settlement.

Under that decree several proposals were made, which were rejected by the Master; who at length made a report; which the Court upon farther directions disapproved; and it was referred to the Master to review his report; and to inquire, whether, Mr. Beresford had made any and what settlement. A farther report was made dated the 12th of February, 1791; stating two indentures, dated the 16th and 17th of March, 1789, by which Benjamin Beresford and his wife assigned the said several sums of Bank stock, amounting together to the sum of 3409*l.* 2*s.* 10*d.* Bank stock, and the sum of 1690*l.* 13*s.* cash in the Bank, and all the interest and produce then due, upon certain trusts therein mentioned; with a direction from Benjamin Beresford, that John Robert should upon payment of the sum of 550*l.* and the interest due thereon assign to the trustees his interest under the indenture, dated the 13th of March, 1783, in the fortune of Sidney Beresford under her father's marriage settlement, subject to such equitable lien as Thomas Like had under the assignment thereof to him therein mentioned, upon trust in the first place to pay Like such sums of money, as should be due to him upon the assignment, and after payment thereof upon the trusts therein mentioned; and that the Master strongly disapproved both the said settlements; and stating another proposal; which the Master approved. Upon the 9th of March, 1791, the cause was brought on for farther directions; and a petition presented by Like and Robert, stating their case, to induce the Court to suspend ordering the settlement, was heard at the same time. The report was [* 509] confirmed; and it * was ordered, that the settlement should be carried into execution: and that out of the residue of the sum of 1761*l.* 4*s.* 8*d.* cash in the Bank after payment of the costs, as directed by the decree, the Bank stock shall be made up 4000*l.*, and should be transferred to the trustees; and that the residue of the said cash should be paid to Sidney Beresford according to the proposal in the report.

The petition was dismissed.

Under this decree, by indentures, dated the 23d of March, 1791, reciting, among other things, that Mr. and Mrs. Beresford had one daughter of the age of nine years, the said Bank stock being increased to the sum of 4000*l.* was vested in trustees upon trust to pay the dividends and interest into the proper hands of Sidney Beresford for her sole and separate use, independent of Benjamin Beresford, and not to be subject to his debts, control, or engagements; or otherwise to pay the same to such person or persons, and for such purposes only, as she should from time to time notwithstanding her coverture by any note in writing under her hand direct or appoint; her receipt or that of her appointee or appointees notwithstanding her coverture, and whether covert or sole, to be a good discharge; and after her decease, upon trust to permit Benjamin Beresford, if

he should survive her, and his assigns during his life, to receive one moiety of the interest and dividends yearly, as the same should become payable, for his and their own use; and to pay and apply the other moiety for the maintenance and education of the children, in such manner as the trustees should think proper: but if there should be no child living at the death of Sidney Beresford, or being such, all of them should die in the life of Benjamin Beresford, upon trust to permit Benjamin Beresford and his assigns to receive the whole dividends and interest during his life; and after the decease of the survivor of him and his wife, to transfer the said 4000*l.* Bank stock to and among all and every or such one or more child or children, in such shares and proportions, in such manner, at such times, and with such maintenance, and subject to such provisos or limitations over for the benefit of such children, as Sidney Beresford notwithstanding her coverture should at any time direct and appoint; in default of and subject to such appointment, upon trust to transfer the whole, or so much, whereof there should be no appointment, to all and every the child and children, to be equally divided, if more than * one, share and share alike; if but one [* 510] to that one; with benefit of survivorship between them, as therein mentioned; and in case all the children should die, before the sons should attain the age of twenty-one, or the daughters should attain that age or be married, upon trust, in case Benjamin Beresford should die in the life of his wife, then immediately after his death and such failure of children, as aforesaid, to transfer the said Bank stock to Sidney Beresford, her executors and administrators: but in case she should die in the life of her husband, then immediately after the death of Benjamin Beresford and such failure of children, as aforesaid, to transfer to such person or persons, and for such intents and purposes, as Sidney Beresford should notwithstanding her coverture appoint: and in default of such appointment, to transfer the whole, or so much, as should not have been appointed, or applied in advancement of the children, as therein mentioned, in trust for Benjamin Beresford, his executors and administrators.

Benjamin Beresford left England after having executed the settlement; and continued abroad.

The prayer of the bill was, that subject to the assignment to the Defendant Robert the Plaintiff may be declared entitled to be satisfied in respect of his debt out of the dividends accrued upon the sums of 2600*l.* and 780*l.* Bank stock, and 23*l.* 2*s.* 6*d.* cash in the Bank, since the marriage of the Defendants; and if the dividends are not sufficient, that so much of the funds shall be sold as will make up the deficiency.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] (1). I have been desired to give my judgment in this cause; which was heard a considerable time ago; otherwise I was in hopes, that seeing

(1) This case was argued, before the Reporter attended at the Rolls.

the inclination of my opinion, they would not have desired it to be formally given: and I postponed my judgment upon that account. I never had much difficulty or indeed any doubt with regard to the case. It is attended with very peculiar circumstances; and the case of the Plaintiff in some respects may be considered rather hard: but the question is, whether under the circumstances, in which it comes before the Court, they can be entitled to any relief. The assignment was not kept a secret; for it is stated in the second report; being laid before the Master by Mr. Beresford. So the Court had full notice of the claim. They did not at that time think fit [* 511] *to file any bill: whether advised, that their right would be attended to, I do not know: but they did prefer a petition; which was dismissed; Lord Thurlow being of opinion, that Mr. Beresford was not entitled under the circumstances to any interest: but that the whole should be settled, with a contingent interest to the husband, in case he should survive his wife (which is liable to the Plaintiff); and that all the rest should be to her use, excluding him from any benefit.

It was insisted for the Plaintiff, that whatever is the rule of the Court as to the equity of the husband to assign for valuable consideration his wife's fortune, at least it must be supposed he has a right to assign the dividends accrued; and farther it was insisted, that by the rules of this Court a husband entitled to an equitable estate in right of his wife may for valuable consideration assign it in such a manner as to be binding upon his wife and her issue; and several cases were cited. All the cases upon the subject, except some since decided, are comprised in Mr. Cox's note to *Bosville v. Brandder*, 1 P. Will. 459, and, no doubt, in almost all the cases the Court in laying down this equity and enforcing it did not mean to determine, that an assignee for valuable consideration should be bound by that equity (1). If that failed, it was insisted, that there is no case, in which the Court has gone the length of saying, that the husband maintaining his wife should not be entitled to the interest of her fortune; and *Sleech v. Thorington*, 2 Ves. 562, was mentioned; in which, though it was not determined, the Master of the Rolls seems to be of that opinion; and he states a case, which I should desire to be more minutely examined, where the husband leaving her totally unprovided for, the Court will lay hold of the fund to maintain her. It remains to see, whether what is laid down there by the Master of the Rolls is well founded. I conceive, he did not attend to the situation of a person, who runs away with a ward of this Court; and I do not apprehend, that when he lays it down so generally, he meant to apply it to such a case as a person running away with a ward of the Court of very tender years, and then insisting upon this right. That is the present case. It comes to be considered, what is this equity, of which we have heard so much. It is not to be denied, that great Judges, Lord Hardwicke and Lord Thurlow,

(1) *Post*, vol. iv. 19, and the note, v. 739. *Elliott v. Cordell*, 5 Mad. 149

have intimated difficulties, whether an assignment for valuable consideration might not support the right of the assignee, or at least evade this equity. I have looked into almost every case; and have never seen it determined, that any such equity does exist in favor of the assignee. It is certain, that the Court has avoided deciding the contrary; and in *Worrall v. Marlar*, and *Bushnan v. Pell*, in the note 1 P. Wms. 459, by Mr. Cox, to whom the public are very much obliged for his great pains in collecting all those cases into a small compass, Lord Thurlow does hold that doctrine; but does not say, that it was ever so decided. Mr. Cox has also subjoined *Mason v. Wenman* before Lord Northington in 1765; who follows Lord Hardwicke in *Jewson v. Moulson*, (a) 2 Atk. 417, in holding that an assignment even for valuable consideration of the property of the wife shall not be available in equity to defraud the wife and children of the settlement to be made by the husband, before he can have any part of it. The words in Atkyns give a reason that is convincing: that it would put an end to the equity of the wife. Lord Hardwicke and Lord Northington have therefore given decided opinions, that an assignment of all the fortune even for valuable consideration will not avail against the wife's equity. But it will be answered, this is different: here, it will be said, is only an assignment of the whole as security for an inconsiderable part of it. Upon the best consideration I am of opinion, that if it was *res integra*, and it came on not upon a bill to undo a settlement already made, the Court has a complete right, if they think fit under all the circumstances, to give to the wife and children any part or the whole of the fortune to which she may be entitled. *Povey v. Brown*, Pre. Ch. 325, does not satisfy me. It is a strange case, and directly contradicted by the two cases before Lord Hardwicke and Lord Northington. The consequence is, that when this came before the Lord Chancellor in 1781, it was for him to consider, whether there was any right in the assignee of the husband; of which assignment there was certainly knowledge; and he was of opinion, there was no such right. The question now is, whether I am called upon to break in upon that. I confess, if I could, I should have been glad to have made some decree in favor of the Plaintiffs, and to have given them some share of the profits, upon the credit of which Beresford had lived, and was enabled to make advances in favor of his wife and children: but all that was fully before Lord Thurlow; and he did not think fit to attend to that claim. I am of opinion, the decree having declared, the wife and her issue ought to have a settlement of all *this property made upon them, [*513] was not contradictory to any rule, the Court had laid down; and even if it was competent to me, I should feel great difficulty before I could undo it. As it stands, I am of opinion, I cannot declare any right to the Plaintiff in any share of that part of the

(a) See *Cape v. Adams*, 1 Dessaus. 567, which the Court say had many circumstances attending it that *Jewson v. Moulson* had.

wife's fortune, that has been settled under the decree of Lord Thurlow; who had all the circumstances before him.

Let the bill, so far as it seeks to impeach the settlement made under the decree of 1791, be dismissed, with liberty for the Plaintiff to apply, in case Benjamin Beresford shall survive his wife (1).

1. For a report of an earlier proceeding in this cause, see 3 Brown, 366.

2. As to the right of a *feme covert* to a provision, in respect of any interest under the control of Equity, proceeding from her, as against the assignee of her husband, see, *ante*, the note to *Burdon v. Deane*, 2 V. 607, and notes 6, 8, 9, to *Pybus v. Smith*, 1 V. 189.

WARNEFORD v. THOMPSON.

[ROLLS.—1797, AUGUST 4.]

PURCHASER decreed to take a title under an obscure will, amounting to a power to sell: the legal estate not being given descends to the heir till execution of the power: and then passes to the vendee. (a)

JOHN WARNEFORD by his will, appointing his wife and Peter Ducar executors, gave to his wife 800*l.* and all his plate and linen, and all other his household furniture of every kind, and live and dead stock of what sort soever, upon condition, that she renounced all dower or thirds and every other claim to his land, goods and property, except such as were devised to her. Then after several pecuniary and specific legacies to his children the testator proceeds thus: "I will that all and all other the residue of my property and fortune whether arising from moneys in hand or from debts due to me and all my lands and houses whether freehold or copyhold bonds mortgages moneys in the public funds and all other securities whatsoever which I shall possess or be entitled to shall continue to be held or shall otherwise be disposed of in such manner and security as my executrix and executor shall think most proper and conducive to the fulfilling the above purposes and those hereinafter mentioned in their truest intent and for this purpose I do hereby give to my said executrix or executor that is to say to either of them as shall be thought most advisable in law all and every my copyhold lands and premises in trust for the said uses and purposes that is to say it is my desire that respect being first had to the aforesaid directions and

(1) *Post*, *Macaulay v. Philips*, *Franco v. Franco*, vol. iv. 15, 515; *ante*, *Stevens v. Savage*, vol. i. 154, and the notes.

(a) A purchaser is not compelled to take a doubtful title. 2 Sugden, Vendors, 183, 184 (6th Amer. from 10th Lond. ed.); *Ten Broek v. Livingston*, 1 Johns. Ch. 357; see, *ante*, note (a) to *Cooper v. Denne*, 1 V. 565. But he will not be permitted to object to a title on account of a bare possibility. But, in many cases, Courts of Equity have compelled a purchaser, upon their own opinion, to accept a title depending upon questions of great nicety; and the present case is classed among these by Sir Edward Sugden. *Ibid.* 181. As to the construction of powers to sell under wills, see 2 Story, Eq. Jur. § 1061-1064.

bequests the profits and interest arising from all my moneys and securities and the rents of all my lands and houses or the interests arising from such sums as such lands and houses or any of them *shall be sold for if my said executrix and executor shall think it most advisable to dispose of them or any of them shall be regularly paid to my wife Susannah during her natural life to be faithfully expended at her discretion for the use and service of herself and for the clothing maintenance and education of all such my children by her as shall not have attained to the age of twenty-one years or who being arrived at that age shall with the mutual consent of my said wife and of such son or daughter continue to contribute to the general expense of the family a sum equal to the interest received from the sum hereby devised to them in the former part of this my will nevertheless if it shall at any time seem good to my wife Susannah to marry again after my decease I do in such case will and desire my aforesaid executor alone to direct the payment of all rents and interest arising as before mentioned or herein intended to be described for the sole use and benefit of my children only and that equally of them all and the same good office I will and intreat him to perform in case the death of my wife Susannah shall happen before my youngest child shall have attained to the age of twenty-one years but nothing herein mentioned relative to the future marriage or death of my wife is to be understood so as to contradict or invalidate the disposition or to set aside any of the bequests contained in the first part of this my will and as for the several principals or sums of money lands or houses securities or moneys from which the above mentioned profits and interests shall arise I do direct that after the second marriage or death of my wife Susannah and the attainment of twenty-one years by my youngest child by her and the payment or lapse of all the aforesaid bequests that they be each and all of them divided and inherited equally share and share alike by and between all my said children and their proper representatives if it shall so happen which may God forbid that the death of all my children and the lawful issue of any shall take place before the death of my wife Susannah I then leave to her during the remainder of her life and after her death equally between her heirs and my executor and his heirs all the above remaining property principal and interest for ever."

The testator died; leaving John Warneford, his eldest son and heir at law, under the age of twenty-one, and Edward, his *youngest son and heir according to the custom of the [*515] manor, of which the copyhold estate was held, and nine other children. The executrix and executor entered into a contract with the Defendant to sell to her part of the testator's real estate consisting both of freehold and copyhold. Objections being made to the power to sell, the bill was filed for a specific performance; and the Master having reported, that no good title could be made, the question came on upon exceptions to the report.

Mr. *Grant*, for the exceptions, said, there was a clear power of

sale; and it was incumbent on the Defendant to show the objection.

Mr. *Piggott* for the report. It is incumbent upon the Plaintiffs to make out a good title. It is sufficient for the purchaser, that there is a cloud upon it, according to *Shapland v. Smith*, 1 Bro. C. C. 75, and *Cowper v. Deane*, 4 Bro. C. C. 80; *ante*, Vol. I., 565. The executors have no legal estate in the freehold; and the copyhold estate is given to them expressly for the purposes of the will; and as to their power to sell, it is a very obscure will; upon which an eminent conveyancer says it is unsafe for a purchaser to rest.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I am clearly of opinion, there is a power to sell. It is true, there is no estate devised to the Plaintiffs in the freehold estate: but there is a power to sell. Till that power is executed, the estate descends to the heir at law; but as soon as the power is executed, the legal estate is in the vendee. No argument could have been raised, if the devise, that follows the power to dispose, had not been confined to the copyhold estate. There is a clear power to the executors to dispose. The exceptions must be allowed, and the contract performed (1)

A POWER of sale, however explicit, does not of itself give the legal property. Where a man directs his executors to sell, till the sale is effected the land descends to his heir at law, and he may enter. *Hilton v. Kenuorthy*, 3 East, 557. And to enable executors to make a title to a purchaser, the power of sale must either have been expressly given to them, (*Bentham v. Wiltshire*, 4 Mad. 49), or it must be necessarily implied, from a direction that the produce of the sale shall be applied by the executors in the execution of their office: *Tylden v. Hyde*, 2 Sim. & Stu. 241: the implication will not arise merely because an estate has been given to minors, with a direction (which during their minority they could not comply with) to sell for the payment of legacies; for, it is not an universal proposition that, when no other person is authorized, or competent, to sell, then the executors have a power of sale; and clearly no implication can be raised in opposition to an express devise: *Patton v. Randall*, 1 Jac. & Walk. 196: but, in the absence of devise to any specified person, if a testator directs his lands to be sold, not saying by whom, and that the money shall be distributed, and appoints an executor, there, it seems, the sale ought to be made by the executor. *Carvill v. Carvill*, 2 Cha. Rep. 304; *Hyer v. Wordale*, cited in 2 Freem. 135: if no executor had been named, the sale must have been made by the heir, upon whom the legal estate descended, but coupled with a trust. *Pitt v. Pelham*, 2 Freem. 135; *Loc-ton v. Loc-ton*, 2 Freem. 136. If the deviser named an executor, but such executor died before the sale was effected, it seems not clearly settled whether the sale should be made by the representative of the executor, or by the heir of the deviser: compare *Auby v. Doyle*, 1 Cha. Ca. 180, with *Tenant v. Brown*, *ibid*.

(1) *Post*, *Balfour v. Welland*, vol. xvi. 151; Co. Lit. 236 a; see Mr. Butler's note, 150; *Hilton v. Kenuorthy*, 3 East, 553; *Souarby v. Lacy*, 4 Madd. 145, Sug. Pow. 316; Vend. & Purch. 5th. edit. 443, &c.

ANONYMOUS.

[1797, August 9.]

THE Court will not control the Master's appointment of a receiver without a special case. (a)

The trustee cannot be receiver. (b)

THE *Attorney General* [Sir John Scott] moved to change the receiver appointed by the Master, upon the ground, that the person rejected was a more proper person, as being more acquainted with the estate and in the confidence of the family. The motion was not supported by affidavit.

*Mr. Lloyd and Mr. Stanley, against the motion, cited [*516] *Creuze v. Hunter*, 2 Bro. C. C. 253. *Thomas v. Dawkin*, ante, Vol. I., 452 (1), and *Bowersbank's Case*, ante, 164, the latter of which was before the Lord Chancellor upon motion; who thought a petition the proper mode; upon which it was determined by the Master of the Rolls upon great consideration.

LORD CHANCELLOR [LOUGHBOROUGH]. I cannot ask the Master his reasons. It is not a subject of emulation between two persons. But here there is another objection; that this person is an accounting party, a trustee; and he ought to check the receiver. He cannot be receiver (2). I do not preclude a special case being brought before the Court impeaching the Master's judgment: but upon the mere naked allegation, that one person is more proper than another, I cannot ask the particular reason, why he preferred the one.

SEE, ante, the note to *Thomas v. Dawkin*, 1 V. 452, as to the appointment of a receiver.

(a) See ante, p. 164, note (a) to *Bowersbank v. Colosseau*.

(b) The appointment of a trustee to be receiver is extremely rare, and only where he will act without emolument, unless no one else can be nominated, who will act with the same benefit to the estate. 1 Barbour, Ch. Pr. 166; *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 ib. 584.

(1) See the note, p. 453.

(2) *Post*, ——— v. *Jolland*, vol. viii. 72.

premises and the annuity during her life; but in case there should be three or more children then living, then after the death of Doctor Hinchcliffe to assign the leasehold premises and the 6000*l.* together with the securities, in which the same should be invested, to and among all such children equally, share and share alike, payable to a son or sons at twenty-one, and to a daughter or daughters at twenty-one, or marriage with consent of their father, if living, or if dead, of the trustees and their mother: provided, that notwithstanding the postponement of the assignment of such shares till after the decease of the father every share should be considered as vested in a son at twenty-one, in a daughter at twenty-one, or marriage with such consent; with a provision for survivorship, and for maintenance by application of the rents, interest and produce, after the death of the father and mother, and for raising upon the requisition of the husband and wife or the survivor such sums, payable at such times as they should under hand and seal with two witnesses appoint for the advancement of any of the children; such sum or sums, as they should require, to be deemed and taken as part of their shares of the trust funds; and if the father or mother should advance any of them out of their own money, then they or their respective executors should receive out of such child or children's respective shares so much, and the same should be deemed as part of such child or children's share of the trust premises; in case he or she should by writing under his or her hand so declare; and not otherwise; and it was provided, that upon the requisition of the husband and wife or the survivor the leasehold premises should be sold, and the 6000*l.* be invested in other securities upon the same trusts.

The marriage took place; and there was issue, two sons and three daughters. The Bishop of Peterborough received the 6000*l.* due on the two bonds; and invested 5425*l.* 17*s.* 8*d.*, part thereof, in a mortgage of an estate, called Breton Ferry: he also sold [* 518] the *leasehold house in March, 1786, for 1050*l.* the trustees not being consulted. He purchased 2050*l.* 15*s.* Irish debentures; whereby certain annuities were made payable to him, his executors and administrators, depending upon the lives of his two sons and his daughter Frances respectively; and another Irish security for a similar annuity for the life of his daughter Emma Duncombe; the whole of which Irish annuities are of the annual value of 134*l.* He also purchased two French annuities of 100*l.* each; depending, the one upon the lives of his wife and his daughters Emma and Frances, the other upon the lives of his wife and his daughter Charlotte.

By his will, dated the 29th of December, 1793, he gave to John Crewe and Benjamin Barnard all his estates, goods, chattels and property, of what nature or kind soever, in trust first to pay his debts and charges of his funeral; and upon farther trust declared in manner following: then to pay his wife the sum of 500*l.* and farther to pay her annually, so long as she shall live, the sum of 200*l.* being the produce of an annuity upon her life purchased of the Duke of

Devonshire, in addition to an annuity of 300*l.* settled upon her at her marriage, and payable by John Crewe, her brother, or by his heirs; and also to pay his said wife during her life the produce of two annuities in the French funds of 100*l.* each: in trust also to pay his wife the produce of all the Irish tontine annuities during her natural life to her own use; and after her death in trust to pay to his daughters respectively during their natural lives the sum arising from the tontine annuities during their respective lives; and in case they or either of them should marry, the tontine annuity of such daughter, who marries, is to be held for her separate use and appointment, not liable to the debts of any husband: "I will my sons to have each his tontine annuity upon the death of their mother; in trust also to pay the interest of 3000*l.* owing to me upon mortgage by the Duke of Grafton; which interest is not to be paid but for the rent of my house in George street; which house I will that my wife have the use of for her life or widowhood, together with the use of all my furniture, plate, linen, pictures and liquors, an inventory being taken of the several articles and lodged with my executor, so long as she remains unmarried: should she marry again, I will, that the 3000*l.* specified to pay the rent be divided equally among my three daughters, who * may be then living, in addi- [*519] tion to what else shall be bequeathed to them: but if one, two, or all of them, be dead, and have left issue, then what would have been the mother's share I would have paid to the representative or representatives of each." The testator then declared, that the lease of his house in George street, household furniture, pictures, linen, and plate, as specified in a schedule, together with what liquors may remain, should become the property of his eldest son, or in case of his death before the death or marriage of his mother, the property of his (the testator's) son Edward: "In trust also, that each of my sisters be paid by my executor an annuity of 30*l.* which they purchased of me; and I will, that to each of them be paid 100*l.* and a mourning ring given in token of my sincere affection, and an addition of 10*l.* a year during their respective lives be made to each over and above the 30*l.*; and upon the death of either I will, that to the survivor during her life be paid the whole annuity of 60*l.* instead of 30*l.* I will also, that my executor with consent of my trustees or the survivor of them may have power to call in for the purposes of my will all moneys in the funds, lent upon mortgage, bonds, or otherwise, and to sell the leases of all my houses, except that in George street, so long as my widow continues to live unmarried; again I will also, that the tontine Irish annuities shall not be sold during my wife's life, nor the annuity upon my wife's life payable by the Duke of Devonshire in trust to pay the sum of 6000*l.* to my son Edward. I will also that each of my daughters, as they shall respectively attain the age of twenty-one, or be married sooner with consent of their mother and my trustees or the survivor of them, be paid the sum of 4000*l.* and until my daughters shall attain the age of twenty-one, or be married with the consent before required, my

will is, that to each be made an allowance, as the trustees and executor may think fit, for her maintenance and education. It is my will also, that after the death of my wife the interest arising from the French annuities of that standing in the names of Emma and Frances Hinchcliffe shall be paid to them; of the other standing in the name of my daughter Charlotte be paid to her. I will, that the annuities themselves be unalienable, and to remain in trust, as is directed in regard to the Irish tontines." After giving some legacies the testator left his eldest son Henry John Hinchcliffe, [*520] whom he also appointed sole executor, * the residue, whatever it might be, of his whole fortune, except his sermons and books of divinity, which he directed to be delivered up to his son Edward.

The testator died in 1794, The bill was filed by the younger children; praying, that they may be declared entitled to the benefits provided for the younger children by the settlement as well as to all the benefits provided and bequeathed to the Plaintiffs respectively by the will. The eldest son by his answer insisted, that from the year 1778 to 1781 and from 1784 to 1793, and, as the Defendant believes, in the interval, his father kept regular accounts of the amount and particulars of his property and of his debts and the progressive increase or decrease of his property by reference to such debts and otherwise from one half year to another; and in such accounts he has regularly set down the money due upon the mortgage, as part thereof; the interest of which mortgage he regularly received without the intervention of the trustees, and gave receipts in his own name; and the leasehold premises were also comprised in such accounts, as part of such property, until sold by the Bishop in 1786; and from that time the produce was brought into the accounts; and was intermixed with and constituted part of the said property; as appears by the said accounts in the hand-writing of the Bishop. The Defendant insisted, that the testator having kept such accounts, and blended the trust property with his own, and calculated upon the whole together without any distinction, made such disposition of the same by his will, as therein contained; and it appears manifestly as well from the state and amount of his property as from the accounts so kept and provision made thereout for the Plaintiffs by his will and the legacy bequeathed thereby to the Defendant's mother, that the testator did not intend to give the Plaintiffs double portions; but intended the portions given to them respectively by the will to be in lieu and full satisfaction for their respective interests under the settlement; therefore they ought to elect.

The accounts referred to by the answer were books in the testator's hand-writing; stating his property and his debts, and comprehending the leasehold premises in Conduit-street, the mortgage upon the Breton Ferry estate and the annuity. At first he valued the house in Conduit-street singly at 1600*l*. Afterwards down to January 1786, he values his three houses at 3000*l*. By that account he values them at 2500*l*. The accounts of July 1786,

and January 1786, state two houses, value 1500*l*. Afterwards he values them with the lease of the house in George-street at 1600*l*. and in 1793 at 1800*l*. The result of the first account in 1778 was, that he was worth 13,572*l*. Every subsequent account stated, how much he was better or worse than the preceding settlement; and the result of the last was, that he was worth 39,138*l*. In January 1786, he states 10,800*l*. 4 per cent. stock, worth, at 87, 9301*l*. and the account of July following (after the house was sold) states 12,000*l*. 4 per cent. stock, at 91, 10,900*l*. The account of July 1786, contained the following items: "Received of Mr. Lunot in part of payment of the house 50*l*."—"Received of Mr. Lunot by his note 31*l*. 10*s*."

The first question was, whether these books of accounts were admissible.

Mr. Graham and Mr. Sutton, for the Defendant. In *Pulteny v. Lord Darlington* (1), Reg. Lib. A. 1773, fol. 710; evidence very similar to this was received, and was one foundation of the decree: a paper-writing purporting to be an account of Mr. Guy's affairs. It appears both by the decree and the notes of the arguments of the Judges, that the extrinsic circumstances, the deeds and other writings, were relied on. In *Jeacock v. Faulkener*, 1 Bro. C. C. 296, Lord Thurlow says, evidence as to the facts, upon which the testator made his will, may be admitted. That is the purpose, for which these books are produced; and not to explain the will. The will being silent as to this point, those facts are necessarily to be taken into consideration, as marking the view of the testator, when he made his will. In *Ellison v. Cookson*, 3 Bro. C. C. 61; *ante*, Vol. I., 100, Lord Thurlow admitted the evidence; and says, it is to be admitted in all cases of a presumption of satisfaction. In the case of Mr. Selby's will it was held competent to give evidence as to the situation of his family. The state of the testator's funds when he makes his will is a subject of daily inquiry. The danger of perjury by admitting parol evidence does not arise in this instance. *Debeze v. Mann*, 2 Bro. C. C. 165, 519.

Mr. Grant and Mr. Steele, for the Plaintiffs. In *Pulteney v. Lord Darlington* the evidence was competent to show, what the testator's acts had been. This was not a question of construction. In **Ellison v. Cookson* there was no question about the [* 522] meaning of the will. The point upon the evidence was only, whether the legacy was adeemed. *Bromley v. Jeffereys*, Pre. Ch. 138, is against the admission of evidence. In *Fonnereau v. Poyntz*, 1 Bro. C. C. 472, the point was much discussed. It is clearly not a settled point. In this case the question is upon the construction of the will, and the object of the evidence is to show, that the will does not mean what *prima facie* it purports.

1796, June 20th. MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN.] I have looked into the point; and have great doubt about

(1) Cited *post*, in *Pole v. Lord Somers*, and *Druce v. Denison*, vol. vi. 309, 385; see 322, 391.

admitting the evidence ; though I am very much inclined to admit it. This is not evidence produced to explain the will in any way : if so, it would be clearly inadmissible. *Heather v. Rider*, 1 Atk. 425, is the strongest case for receiving written evidence of the intent that can be : but I cannot understand that case ; and I suspect, there is some mistake in it. I did not know before, that the books of General Pulteney had been admitted in evidence. I will hear the evidence : but I desire not to be understood as admitting it. When I give judgment, I will decide, whether it is to be admitted or not.

For the Plaintiffs. The testator will be supposed to intend to give his own estate, and not to affect what he had no power over. The gift of an annuity to his wife in addition to the annuity provided by the settlement shows, he recollected the settlement : he must then have recollected, that his children were entitled to certain provisions under it ; therefore if he intended a satisfaction, he would have expressed it. He cannot be supposed to have forgotten the provisions of the settlement ; which is the ground in some cases. The argument, that the Court leans against double portions, applies to the case of a will, where the testator has advanced the child in his life ; but has not the same force in the case of a marriage settlement ; for the provisions for the children are purchased upon the marriage by the wife : it is not the mere bounty of the parent, within his power, and revocable, as in the case of a will. In *Warren v. Warren*, 1 Bro. C. C. 305, Lord Thurlow does not approve the doctrine against double portions except upon the ground of a clear intention to substitute the new provision for that in the settlement. It is necessary, that the intention not to give double portions should be apparent on the will itself ; as it was in that case ; [* 523] where *it appeared from the testator's declaration, that he had totally forgot the settlement. Part of the settled property moved, not from the testator, but his wife.

For the Defendant. Lord Thurlow decided *Ellison v. Cookson* upon the general principle against double portions : having read the evidence. The cases have even gone the length of holding a second provision for children, though less than the first to afford a presumption of satisfaction, and to throw the *onus* on the other party. The cases are collected by Mr. Cox in his notes upon *Copley v. Copley*, and *Hartop v. Whitmore*, 1 P. Wms. 148, 682. The rule is laid down broadly ; that the subsequent disposition for children cancels the former ; discharging the moral obligation ; which is to be done but once for all. In *Bellasis v. Uthwatt*, 1 Atk. 426, Lord Hardwicke says, that in the case of an eldest son and a number of younger children it is not to be inferred, that the testator meant to burthen the eldest with double portions.

In *Ackworth v. Ackworth*, shortly stated in the note to *Warren v. Warren*, it appears from the Register's Book, that the legacies were decreed to be a satisfaction ; and there was no circumstance to show, the testator did or did not recollect the precedent disposition. In *Pulteney v. Lord Darlington*, Baron Eyre said, he did not

agree with the position laid down, that a testator does not mean to give what is not his: though the subject may not be his, he may think it his, and give it as such. The testator has done that. He has included the settled property in the distribution he makes among his children; considering it as his for the purpose of that distribution. The purport of the evidence is to show, he considered the trust property as part of his own estate; and that he received and applied it to his own use. The lease of the house in Conduit Street was renewed and assigned by him without the intervention of the trustees. By receiving the value of the house in Conduit Street and the difference between the 6000*l.* and the mortgage, he became a debtor to his children; therefore it is the same as if he had been under covenant, in which case it would have been a satisfaction. There is no distinction between a covenant and a debt by his own act; *Weyland v. Weyland*, 2 Atk. 632. The express addition to the provision for his wife excludes the supposed addition in favor of the children. *Hearne v. Hearne*, 2 Vern. 556, is very strong to show, the Court looks at what the will meant. Though *Lord [*524] Thurlow in *Warren v. Warren* expresses an extrajudicial opinion against the rule; he acknowledges it in *Powell v. Cleaver*, 2 Bro. C. C. 500. The clause in the settlement, that an advancement by the Bishop should not be a part payment, unless so provided, was only the caution of the conveyancer; and does not apply to the case, where the Bishop is making a distribution of all his property. There is no difference because part of the settled property moved from the wife. Though the principal subject of the settlement was his wife's property, yet if there had been no settlement, it would have been his by marital right.

Reply. In *Grave v. The Earl of Salisbury*, 1 Bro. C. C. 425, and *Ellison v. Cookson*, Lord Thurlow wonders at the principle of the presumption. In case of an increase of fortune the natural presumption is, that the parent means to augment the provision for his children. As he has given more than what would amount to a mere satisfaction of the settlement, they are obliged to admit, he means bounty in some extent. The cases upon covenant are very different. The testator having once noticed the settlement in making the addition in favor of his wife thought it unnecessary to repeat that as to his children. It may be said, that if he meant to include the provision by the settlement, he ought to have said so. It cannot be inferred from these accounts that he had forgot the settlement. It was natural for him to throw the trust property into the account of the rest of the property; because he was to have it for life; and had also an eventual interest in the capital, and was to calculate upon it as much as upon the rest. He could not exclude it from an account of the state of his affairs. He must have taken notice of it as a part of his annual income. It is too strong an inference, that he meant to treat this as his own property, because he did not open two accounts with mercantile exactness. He could not forget the existence of the mortgage, upon which part of it was laid out;

for he was receiving the interest. He must have known, he had no power over that. He did exercise a more direct act of ownership over the house. If they rely upon that, they must take it with the distinction made by Lord Hardwicke in *Weyland v. Weyland*, that it is a satisfaction, only because it is a debt. At the time of the settlement he could not make the provision. It was made out of the fortune of his wife. His fortune bore no proportion to what it was afterwards. Though, if no settlement had been [* 525] made, the *property of his wife would have been his by marital right, yet in construing the intention you must take the real fact. The will does not appear to pursue the settlement. The provisions are totally different.

1797, Aug. 12th. MASTER OF THE ROLLS. This cause has stood a considerable time; and the greatest doubt, I had, was, how far certain memorandums, a state of the testator's property, as drawn out by himself, could or could not be admitted in evidence in any degree to affect the question now under consideration. Upon consideration of all the cases, and the principles, upon which they are determined, respecting the intention of the testator in giving a portion by his will to a child already provided for by settlement, I am of opinion, that without intrenching upon any of the rules respecting evidence, of which I am as jealous as any Judge, that ever sat in a Court of Equity, this state of his property is evidence, and is very material: at the same time I do not mean to have it understood, that I decide entirely upon that; for, independent of that, the facts themselves together with the rules, as applied to settlements and wills providing portions for children, are sufficient to show the intention, that the provision by the will should be a satisfaction of the portions provided by the settlement. The books would be evidence, if only to prove the fact of the disposition of the house. It appears by them, that the house was sold between the 1st of January, and the 1st of July, 1786: the particular time does not appear: for so much did he suppose, the house was at his own disposal, that he does not take any notice of the sale. It clearly appears, and you may trace it in the books, that the produce was laid out by him in the funds. Of the 6000*l.* it is plain, he received near 600*l.*: the rest was laid out in a mortgage. It does not appear, that he gave any receipt or acknowledgment. He bought the lease of another house. It does not appear, that he ever consulted the trustees with regard to the sale of the house, or considered himself as violating the settlement; which certainly in strictness he was doing. But I use that only as an argument, that he conceived of this settlement differently from what it really was; for it is impossible to [* 526] *read this state of his property, and to consider him as aware of the extent of his interest, and wilfully breaking through the settlement; for there never was a more careful or regular man. It appears, he kept an exact account of the state of his affairs. He states every year what his property was, calculates the amount, and the next year says, whether he was better or worse

than at the former settlement. This is evidence, not for the purpose of explaining the will itself, for which it is clear, it cannot be admitted, but to show the circumstances, under which he made his will. It is clear, the money arising from the sale of the house was not received by the trustees. From the accounts I cannot exactly trace, how the purchase-money was paid. There are only two receipts entered: one for 50*l.* the other a note for 31*l.* 10*s.* I suppose, the rest was paid in money. In 1786 the testator began to be more accurate and more attentive to the value of his property. For some time before that he began to make half-yearly accounts. I cannot trace the increase of the 4 per cent. stock in the interval between the accounts of 1786 otherwise than by the produce of the sale of the house; and it appears, he received part of the purchase-money, by the other entries. It appears, his property had considerably increased. He made his will not a great while before his death; and I am sorry, it was so near; for it appears, that in all probability he had not as complete a recollection of his affairs, as if he had been in better health.

The bill claims both the provisions under the settlement and the will; to which it is answered, that according to the principles of construction of the will of a parent, where portions are provided by a settlement, it ought to be taken in satisfaction; and under all the circumstances of this case I am of that opinion. It was extremely well argued; and every case, that could bear upon it, was very fully observed upon: but it was said, that of late that doctrine, that appeared established respecting double portions, had received some discountenance from Lord Thurlow; and that he had in *Warren v. Warren* and some other cases hinted a disapprobation of it. From the whole of those cases relied on to prove that I see clearly, that he never did mean to say, such a rule does not obtain in this Court; that a portion provided by the father is to be *prima facie* intended as a satisfaction. It is very true, that speaking chiefly of the ademption of a legacy by the advancement of the parent afterwards he laments, that the Court has carried it so far as to go in some cases against the intention: but so far from saying, that rule is not established, he says, it is too late to say, it is not the rule now; though it is frequently carried even against * the [* 527] intention. I never found, that he meant to break through the rule. No man criticised more upon rules laid down by other Judges: but no man was more rigid in observing them, when he could once deduce them.

The cases, I chiefly rely upon, are *Copley v. Copley* and the succeeding cases, particularly *Warren v. Warren*; which never was determined by Lord Thurlow. I wish this to be considered as different from the cases of a will and a subsequent advancement. The cases before Lord Thurlow were chiefly of that kind. I take the rule to have been never yet departed from, that *prima facie* a portion to a child by the will of the parent (1), if there is any other prior pro-

(1) Personal estate, taken under an intestacy, no satisfaction. *Twisden v. Twisden*, *post*, vol. ix. 413.

vision, is a satisfaction, unless it is shown clearly that it is not so intended. *Copley v. Copley* is more shortly reported than most of the cases in Peere Williams: but Mr. Cox has stated it from the Register's Book. The time of payment of the sum under the second settlement does not appear in the Register's Book: but the circumstance of that sum not being payable, unless the daughter married, was insisted on in argument to show, it was not a satisfaction for the portion at all events payable at the age of twenty-one. Without taking up the time of the Court in commenting upon the intermediate cases, all of them are cited and relied upon in *Warren v. Warren*. I do not know, whether the judgment pronounced by Lord Commissioner Ashhurst is to be considered as the opinion of all the Lords Commissioners; for Lord Loughborough did not attend that day. Lord Thurlow, when the cause came before him, is stated to have thrown out this: "a great number of cases have been cited to show, that the Court leans against double portions: but I have not found, that it would do as a distinct rule, that where a parent has made a provision by will for a child, whom he has afterwards provided for in marriage, it is *prima facie* a satisfaction." That is not the case before him. I suppose, if he said so, it must be upon some cases cited in argument. From that and what follows it has been assumed, that he was of opinion, there was no such rule. In subsequent determinations he has said, it is too late to question the rule: but it has been carried too far. The Lords Commissioners gave their opinion shortly; and they particularly mention the rule. The three cases in the note to that report are very material. *Ackworth v. Ackworth*, 19th July, 1773; *Byde v. Byde* (1), before Lord Northington, 1 Geo. III.; and *The Duke of Somerset v. The Duchess of Somerset*, before Lord Camden, 9th, 10th, and 11th March, [528] 1767. **Ackworth v. Ackworth* very much resembles this

case: but it is so long in the Register's Book, that it is not very easy to extract what the case was. A sum of 2200*l.* was settled in trust for the husband for life; then for the wife for life; then for the children, with a power of appointment. The husband by will gave 2000*l.* to each of his children; and directed, that his wife should take the interest for life in lieu of her settlement: the legacies were decreed to be a satisfaction. As to *Byde v. Byde*, the Register's Book has only the dismissal of the bill; from which I collect, that the bill was brought by the children, having received one portion, for the other; and was therefore dismissed. I have not examined the Register's Book as to the Duke of Somerset's case: but if it is as reported, it is exceedingly strong. Portions were provided for younger children: the father by his will made a fresh provision for every branch of his family: an election was directed.

It remains to see, whether there were any peculiar circumstances in *Warren v. Warren*. It is said, the ground of that case was, that it was clear, the testator had forgotten the settlement; and that in

(1) 1 Cox, 44; 2 Eden, 19.

this case he has not. That is a very considerable ingredient ; that having forgot one provision he could not mean them to have both ; but then you must resort to the rule of double portions ; for that would not have done in the case of other persons ; as if a debt was due, and he had forgot it (1) ; for *non constat*, that he would not have done it, if he had not forgot it : I do not know, that it would do in the case of a wife : *non constat*, that, if he had recollected, there was something else, he would not have given it (2). Here it is clear, he recollected, there was some settlement upon his wife : but that he recollected what that was, is by no means clear.

A circumstance occurs here much relied upon in *Jeacock v. Falkener* (3) : he gives her certain bounties : which he declares to be in addition. Why does he not say so as to the children ? He knew, he had made a settlement, but forgot the nature of it. He recollected, he had made some provision for his children ; but did not know all the ingredients. *Jeacock v. Falkener* is a strong case ; I think a hard case, I confess : but I am perfectly satisfied with it upon the reasoning. All the circumstances are extremely strong to fortify what I take to be the rule ; that if portions are provided by any * means whatsoever, and the parent gives [* 529] a provision by will for a portion, it is a satisfaction *prima facie*, and unless there are circumstances to show, it is not so intended ; and nothing is more clear, than that these are meant for portions. Maintenance is given by both. Though this is not the case of an eldest son having an estate, upon which portions are charged, yet the Defendant is, as Lord Loughborough says, general representative in land or money, upon whom the burthen of the portions would fall. The doctrine upon this point is very shortly stated, and in a manner, to which I perfectly accede, in *Devese v. Pontet*, before Lord Kenyon, Finch's Pre. Ch. 240, *n.* that the rule should be adhered to, as laid down by a very great Judge, Lord Somers ; who observed in *Goodfellow v. Burchett*, that cases of this nature depend upon circumstances ; and when a legacy has been decreed a satisfaction, it must be grounded upon some express evidence or at least a strong presumption, that the testator intended it as such. Adopting this rule, as laid down unequivocally by Lord Somers, I am of opinion, that the portions by the will are intended in lieu and satisfaction of the portions by the settlement (4).

It is hardly worth while to state the difference between these cases and those upon the satisfaction of a debt by a will. Of all rules, that have been adopted in this Court, I should regret the rule, that a legacy is a satisfaction of a debt, provided it is equal to the debt. That however is clearly established : but any little circumstances are laid hold of by the Court to take it out of the

(1) See Mr. Cox's note to *Chancey's Case*, 1 P. Wms. 410, and the note, *post* 529.

(2) *Richardson v. Elphinstone*, *ante*, vol. ii. 463.

(3) 1 Bro. C. C. 206.

(4) See the notes, *ante*, vol. i. 112, 259.

rule (1). That is admitted at the bar not to be the case as to this doctrine of portions: for if both have the same object, and there are only slight differences, still they shall not both avail.

As to the books, I am clearly of opinion, nothing of this sort is admissible to prove, that the will has a meaning different from that, which it purports on the face of it: but it is to prove the circumstances, under which the testator made his will, with regard to the portions provided for his children, as to the state of his property and what he meant to give. The case of *Pulteney v. Lord Darlington* is very analogous. The question was, whether General Pulteney did or did not intend to comprise in the will an estate, of which he supposed himself the owner. To prove, he did, the steward's accounts and a settlement, as drawn out by him, of the [*530] state of his property were offered in evidence, and *admitted, and commented upon. I have a note of the judgment upon the 28th of June, 1776. Chief Justice De Grey says, "the intention appears from circumstances sufficient to make an impression upon my mind, and confirming the opinion, I had formed, not to throw entirely out of the case this settlement by a great family. A man may give by a mean and indirectly what is not his own; either by express condition, or equity arising upon an implied condition: the two modes are quite different; and were too much blended in the argument. Where the testator has neglected, probably from ignorance, possibly from inattention to the nature of the estate, to insert such a condition, then a Court of Equity interposes. The cases of double portions have no analogy to election: it is true, they involve election: but they do not depend upon election." Baron Eyre says, he does not agree to the position laid down in the general sense of it, that where a man gives all his estate, he does not mean to give what is not his: what he thinks his is in the sense, he uses the word, his (2).

It is impossible to doubt, that the Bishop did conceive, he had a right to dispose of all the property, he there describes as his own, in satisfaction of this settlement. It is impossible not to say, he thought, the settlement had not specifically bound this property. The bill therefore must be wholly dismissed.

I desire to be understood, that the books, I have admitted, are upon the question of election; upon which question I take them to be admissible: but not to explain the will (3).

1. As to the propriety, in testamentary causes, of receiving evidence of matters *dehors* the will, see the notes to *Stratton v. Best*, 1 V. 285; and note 1, to *Baugh v. Read*, 1 V. 257.

2. With respect to the *prima facie* presumption against a child's claim to a

(1) The same rule prevails, if the legacy is greater than the debt. See *Chancery's Case*, 1 P. Wms. 408, and Mr. Cox's note. *Ante*, 466; *Wallace v. Pomfret*, *post*, vol. xi. 542.

(2) See the notes, *ante*, vol. i. 523, 527; *post*, V. 325, 400.

(3) *Post*, *Eden v. Smyth*, *Osborne v. Duke of Leeds*, vol. v. 341, 369; *Pole v. Lord Somers*, *Druce v. Denison*, vi. 309, 385; and the note, 325; *Robinson v. Whalley*, ix. 577; 1 Ball & Best. 542.

double portion, and the admissibility of evidence to repel that presumption, see note 6, to *Blake v. Bunbury*, 1 V. 194; the notes to *Ellison v. Cookson*, 1 V. 100; and note 2, to *Barclay v. Wainwright*, 3 V. 462; and as to the importance of adhering to established rules, however doubtful their original propriety may appear, see note 4, to *Ellis v. Smith*, 1 V. 11.

SPARKES v. CATOR.

[ROLLS —1797, AUGUST 12.]

PORTIONS for children by the will of the parent held a satisfaction of a provision by settlement, upon the intention: slight circumstances of difference, that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. (a)

By settlement, dated the 22d of August, 1765, reciting an intended marriage between Joseph Sparkes and Mary Cator, and that John Cator, the father of Mary, bequeathed to her 3000*l.* one moiety to be paid upon her marriage, the other upon the decease of her mother Mary Cator, his executrix, and that her * mother [* 531] had agreed to pay to Joseph Sparkes upon the marriage 2000*l.* part of the said legacy, and which with 1000*l.* to be paid to him upon the death of Mary Cator, the mother, would be in full of the said legacy; and that the said Mary Cator, the mother, intended in her life or by will to give to Joseph Sparkes the farther sum of 1000*l.* to be settled in manner after mentioned, in consideration of the marriage and the said 2000*l.* and for making a provision for the wife and issue, Joseph Sparkes covenanted to execute two bonds; one for the payment of 4000*l.* within three years after the marriage, the other in the penal sum of 4000*l.* with a condition, that so soon as Joseph Sparkes should become possessed of the 1000*l.* payable upon the death of Mary Cator, the mother, under the will of John Cator, and of the other sum of 1000*l.*, he should pay the same in trust to pay the rents, interest, dividends and produce, to Joseph Sparkes for life; and after his decease, in case his wife should survive, and there should be any issue living at his death, as to 2000*l.* part of the said 4000*l.* in trust for Mary his intended wife, her executors, &c.; and as to 2000*l.* residue thereof, to pay the said Mary all the rents, interest, dividends and produce, for her life; and after their several deceases in trust for the only child, and if more than one, for all and every the children living at the decease of the survivor of the husband and wife, to be equally divided; and in case the wife should survive, and there should be no issue, or all should die in her life under twenty-one, and without issue, in trust to assign the whole 4000*l.* to the wife, her executors, &c.: and as to the two sums of 1000*l.* each upon trust to pay the

(a) See *ante*, p. 516, notes (a) and (c) to *Hinchcliffe v. Hinchcliffe*; and note (a) to *Richardson v. Elphinstone*, 2 V. 463.

whole interest, dividends and produce, to Joseph Sparkes for life ; and after his decease, in case his wife should survive, to her for life ; and after their several deceases upon the same trust for the children, as aforesaid ; and if there should be no issue, or all should die in the life of the wife under twenty-one and without issue, upon trust for Joseph Sparkes, his executors, &c.

The marriage took place, and the bonds were executed.

Joseph Sparkes by his will, dated the 17th of May, 1786, gave to his son John 800*l.* to be paid at twenty-one ; " which with 700*l.* which I advanced for him as an apprentice fee makes his legacy equal to those hereafter given to my three other sons." He gave his daughter Harriet 2000*l.* to be paid at twenty-one, or marriage with the consent of his wife, if living, or his executors, if she was dead, or of such as should be appointed by her agreeably to a power afterwards vested in her. He gave his three sons George, Joseph, and Henry 1500*l.* a-piece, to be paid at twenty-one res-

[* 532] pectively : *but declared, that what sums should be advanced in the mean time by him, his wife, his executors, or such person as should be appointed by her under the power, for apprentice fees or other purposes beyond those of maintenance and clothing and education should be deemed and taken as part of the said legacies ; and the sum so advanced for each son should be deducted from his legacy : " What sums I shall advance will appear by my books wherein the same shall be charged to separate accounts as is already done in the case of my son John ;" and he directed, that if any of his children should die before the time of payment of their legacies respectively, such legacy or legacies should be divided among the survivors, payable as the original legacies. He gave the annuities for lives, which he should die possessed of, and all the rents, issues and profits, of all other his estate and effects real or personal of whatever nature, to his wife, to be received, managed, possessed and enjoyed, by her, she continuing a widow, without control from his executors, subject to an annuity of 10*l.* to his sister, until the legacies aforesaid should become payable ; relying upon her judgment to appropriate in the mean time such part of his principal moneys, which she is hereby empowered to do, or the income, dividends and profits, as they shall be requisite for the maintenance, education, and uses, of their children, or for apprentice fees or other purposes toward promoting the interest of their sons ; and after payment of the said legacies then he gave all the income of the annuities as might be in being, and all the rents, dividends and profits, of such part of his real and personal estate as should be then remaining, to his wife, to be used, managed, possessed and enjoyed, for her life without control from his executors, she continuing a widow. He gave his four sons the farther sum of 1000*l.* a-piece, payable after the death of his wife and within three months afterwards to such of them as should be twenty-one, and to the others, when they should attain that age. He gave his daughter Harriet the farther sum of 2000*l.*, to be paid her within three months after his wife's death, provided

she should then be twenty-one, or married with his wife's consent ; if neither, then to be paid to her when twenty-one, or married with consent of his executors or the executors under his wife's power or the major part of them ; and if either of his said children should die before his wife, leaving no lawful issue, the legacy or legacies of the child or children so dying to be divided equally among the survivors, payable at the same time as the original legacies ; Provided, if any of the children die, their issue shall be entitled to the legacies of their parents, to be paid at twenty-one. All the remainder of his estate and effects, except what he might by his will give to the child, his wife was then *enicient* with or might be *enicient* with at his death, he gave the same both real and personal to his wife, to dispose thereof, she being a widow, to and among all or such of their children or their issue, in such manner and proportions as she should think proper during her life or by will ; in default thereof the said remainder or so much as should be unappropriated at her death to be divided in equal shares among such of their children as might be then living, and the issue, if any, of such as might have died during her life : the issue of each deceased to have an equal share with those, who may have survived his wife ; such shares to be paid at the same times as the original shares. Then, in case his wife should marry again, he directs, that instead of the benefits thereby given or intended for her she should receive and be entitled to such only as were provided for her by the marriage settlement : and that immediately upon her marriage her power as executrix should cease ; and the possession and management of his affairs and effects should be carried on by his executors ; and as to the moneys given in legacies, payable after her death, the same must after her marriage be considered as making part of his estate and effects, to be disposed of as follows : as to all such parts, as shall be unappropriated at her marriage, to be applied in the first place to the payment of the legacies hereinbefore first given ; namely, the 2000*l.* to his daughter Harriet, the 800*l.* to his son John, and the 1500*l.* a-piece to his other three sons, after deducting from his said three sons' legacies whatever sums shall have been advanced respectively for apprentice fees or other purposes beyond those of education, clothing and maintenance ; in the second place, to the payment of 2000*l.* more to his daughter Harriet and 1000*l.* a-piece to his four sons ; and the remainder to be divided among all his children, share and share alike, payable at such times and under such conditions as they would have been entitled to receive the legacies given, in case his wife died unmarried. He appointed his wife * executrix during her [* 534] widowhood subject to no control from his executors or either of them ; and he appointed his brother and brother-in-law executors upon her marriage, or death without appointing executors under the power given to her. Then reciting, that she had been brought to bed of a daughter, since he began to write the foregoing, he bequeathed to his said daughter the like legacies as hereinbefore given to his sons : that is to say, 1500*l.* and 1000*l.* and that she should have a

share equally with his sons in his estate and effects in the event of his wife's marriage, or her dying without a will, as before set forth, and an equal benefit of survivorship with his other children ; such legacies and shares to be paid at such times and under such limitations respecting marriage as his daughter Harriet's shares and legacies.

By a codicil executed in 1789 the testator hoping, his daughter Harriet, while single, would continue to live with her mother, and being unwilling to lessen his wife's income unnecessarily, gave his said daughter 1000*l*. only at twenty-one instead of 2000*l*. the said 1000*l*. to be paid her on her marriage, or if she remains single after his wife's death, in the same manner as her other legacy of 2000*l*. " thinking it right to make the fortunes of my two daughters more nearly equal, instead of the legacies hereinbefore given to my youngest daughter Juliana Caroline Joan," he bequeathed her 2000*l*. upon her day of marriage, provided she should be then twenty-one ; if younger, then 1000*l*. upon her day of marriage, and the other, when she should arrive at that age ; and he also bequeathed to her the sum of 1500*l*. payable after his wife's death ; and declared the said legacies payable under the same limitations as those of his daughter Harriet : and that his said youngest daughter should have the same benefit of survivorship as his other children, and come in for an equal share with them of his estate and effects, in case of his wife's dying without a will or marrying again.

By another codicil, executed in 1790, reciting, that he had lately advanced 1000*l*. for his son John as a premium for being admitted into a partnership, the testator revoked the legacy of 800*l*. made payable to him at twenty-one.

The testator died in 1790. His widow did not marry again. She died in 1794 ; leaving the six children mentioned in her husband's will surviving. By her will she gave all the money [* 535] * arising, after all her debts paid and the legacies under the will of her husband, to be divided share and share alike between her three sons and youngest daughter, George, Joseph, and Henry Sparkes, and Juliana Caroline Joan Sparkes. John and Harriet Sparkes received their legacies. Harriet married — Heapy.

The bill was filed by George, Joseph, Henry, and Juliana Caroline Joan : praying an account of the personal estate, and a declaration, that the legacies given by their father's will to Harriet, and the sums advanced by the testator in his life to John, together with the legacy given to him, should be taken as a full discharge and satisfaction of what they would be entitled to under the marriage settlement.

The cause came on for farther directions ; and stood some time for judgment.

MASTER OF THE ROLLS, [Sir RICHARD PEPPER ARDEN]. This is exactly upon the same ground as *Hinchcliffe v. Hinchcliffe* (1), and

(1) The preceding case. See *ante*, *Ellison v. Cookson*, vol. i. 100 ; and the notes, pages 112, 259.

is a stronger case. I consider that case in a great measure as a case of covenant; for the testator was indebted for all, he put in his own pocket; and it is hardly possible to suppose, being accountable for this money to his children, he should mean them to have both. That case would not have created so much difficulty, if it had been upon covenant; for then he would beyond all question have satisfied that covenant. The question is, whether there are any circumstances in the provision made by the will different from that by the settlement, to show, the one is not intended to be in lieu and satisfaction for the other. It falls within the principle of *Lee v. D'Aranda*, 3 Atk. 419; 1 Ves. 1, and those cases, where a man has covenanted to do a thing, and has done something tantamount to it (1). When it comes to be a question between parent and child, small circumstances are not sufficient to repel the presumption, which with regard to third persons would be sufficient. Here there is nothing but the circumstance of making the payment three months after the death of his wife instead of at her death. The provisions by the will are much greater than by the settlement. Upon the will there are many circumstances to show, the testator could not have intended them to have both. From *the [* 536] directions as to maintenance and education he evidently means portions: and I cannot collect any one circumstance from the will to show, that he had not in contemplation any provision, he had made by covenant or otherwise upon his marriage, and intended a satisfaction. The slight difference of being payable within three months after the death of his wife instead of immediately upon her death cannot make a difference, to show, he did not mean a satisfaction of a covenant, which is literally fulfilled, and more. The principles of *Haynes v. Mico*, 1 Bro. C. C. 129, cannot be considered as applicable. Therefore this is a satisfaction.

1. As to the doctrine of satisfaction in a case between parent and child, see the note to *Ellison v. Cookson*, 1 V. 100, referred to in the last preceding note.

2. That a covenant may, in certain cases, be considered as performed when a tantamount effect has been produced, see note 3, to *Wilson v. Piggot*, 2 V. 351; but (although Lord Alvanley [ARDEN], in the principal case, thought the questions, when growing out of marriage settlements, and arising with reference to parent and child, were, "in a great measure," similar) Lord Eldon in *Trimmer v. Bayne*, 7 Ves. 515, observed, there is this distinction between cases of double portions and covenants, namely, that in considering whether the obligations can be held to have been complied with, slight circumstances of difference are overlooked with regard to double portions; whilst a stricter rule must be applied as to the satisfaction of a covenant. The same distinction had been previously recognized by Lord Hardwicke in *Clark v. Sewell*, 3 Atk. 98, as it has since been by Lord Mansfield in *Monck v. Lord Monck*, 1 Ball & Bea. 304.

(1) See *Richardson v. Elphinstone*, ante, vol. ii. 463. Personal estate, taken under an intestacy, no satisfaction. *Twisden v. Twisden*, post, ix. 413.

MACKELL v. WINTER.

[1797, August 1, 4, 14.]

VESTING of a legacy postponed to the time of payment, and a limitation over in nature of a cross-remainder implied from the general intention; reversing a decree that it vested at twenty-one. (a)

The distinction between a legacy given at twenty-one and payable at twenty-one is a positive rule of the Ecclesiastical Court, adopted as to personal legacies, but not as to real estate: and not approved, or to be extended, (b) [p. 543.]

In this cause the decree, pronounced at the Rolls (*ante*, 236), declared the Plaintiff entitled to two thirds, and Catherine Winter to one third. Catherine Winter married James Bolger; and they appealed from the decree.

Attorney General [Sir John Scott], Mr. Lloyd, and Mr. Campbell, for the Appellants. 1st. The interest, the grandsons took during their minority, was not a vested interest: 2dly, If it was, it was capable of being divested: 3dly, If so, attending to the gift of the whole [* 538] over to Bundy, a gift to the grand-daughter arises by *implication upon the principles of cross-remainders. The testatrix did not mean, that this property should ever be separated. The two grandsons might have died very young, and the grand-daughter might have survived them, and yet have died under twenty-one: it would be a singular intention to impute, that in that interval the two thirds should be considered as belonging to the representative of the survivor of the grandsons, but in the event of her death under twenty-one and unmarried, that vested interest should be divested, and attracted by her share should go over to Bundy. A much stronger implication has been made by enlarging an estate upon the general intention against express words, that no larger estate should be taken; as in *Robinson v. Robinson*, 3 Atk. 736. 2 Ves. 225. 1 Bur. 38. The Master of the Rolls wished to decide in favor of the grand-daughter; but thought, that in order to do so, he must add a term to the will: but that is not necessary. There is a sufficient ground for implication: 3 Leon. 55. Com. Dig. 3. Devise, N. 12. *Doe v. Summerset*, 2 Black. 692. *Stanton v. Peck*, before Lord Kenyon at the Rolls, as to cross-remainders.

Solicitor General [Sir John Mitford], and Mr. Graham, in support of the Decree. The Court is called upon to insert words in the will by means of what they call implication. A will is never construed to give property by implication, unless that, which is clear and plain upon the will, cannot have effect, if that implication is not made. In the case in Leonard of a devise to A. till the testator's daughter should attain twenty-one, and if she died, to B. the daughter being heir, to whom the estate would have descended, and there being therefore no other person, who by possibility could take,

(a) See *ante*, p. 236, note (a) to S. C.

(b) See 2 Williams, Exec. 881.

the implication, that she should take for life, was necessary; and the disposition to B. could not have effect unless upon that construction. The implication must be absolutely necessary, as in the case of the devise of a freehold house to the heir after the death of the devisor's wife: Vaugh. 263, and in Cro. Jac. 75, the case is decided, that if a term is so given, the implication does not arise. It must be absolutely and throughout necessary. If the words can be satisfied without it, the Court will not raise it. *Sympson v. Hornsby*, Pre. Ch. 439. The grounds for implying cross-remainders in *Holmes v. Meynel* (1) and the other cases are the terms of the devise over, the nature of the property, and the intention, that * it should go over entire. There is a great difference [* 539] between real and personal property. With respect to real estate, the only way, in which that intention can be executed, is by implying cross-remainders to fill up the interval. The limitation over must be wholly void, unless the implication is made. In the case of personal property the descendants are not in contemplation. There is no necessity for the implication in this instance. If it was a vested interest, the representative will take: if it did not vest, then it will go as undisposed of to the next of kin of the testatrix at her death; who happened to be the three grand-children. If it had happened, that the nephew was next of kin, the implication would have arisen of necessity. To raise cross-remainders, the distribution ought to be equal: but they take unequally. Implication is excluded by the express declaration in favor of the grandsons upon the death of the grand-daughter.

As to the point, whether the interest given to the grandsons was vested, it is in terms of immediate gift, and unquestionably vested upon the first part of the will. It is *debitum in presenti solvendum in futuro*: *Nicholls v. Osborn*, 2 P. Wms. 419. *Chaworth v. Hooper*, 1 Bro. C. C. 82. The Master of the Rolls was right in saying, he could find no words to divest it. In *Doo v. Brabant*, and *Gough v. Calthorpe*, 3 Bro. C. C. 393, 395, 4 Term Rep. B. R. 706, though the intention could not be doubted, the principle, that *quod voluit non dixit*, prevailed.

Reply. The direction to pay out of interest, which belongs to an infant, will not of itself alter the general rule, that a residue, or legacy given, but payable at a particular time, is vested before the day of payment: but in applying that rule the Court must look at the whole will. If the testator has shown clearly, that the legatee is not to have the fruit of the legacy, not being entitled to the interest, he cannot be intended to have the principal vested in him. The description of what is to go over is the whole residue with the accumulations thereon as aforesaid. The nephew is not to take any thing, unless he takes every thing: and not only the principal, but what had arisen from the accumulation of interest not applied in maintenance and preferment. This disposes of *Nicholls v. Os-*

(1) Stated in *Comber v. Hill*, 2 Stra. 968, from the several Reports.

born, *Chaworth v. Hooper*, and all those cases, where the gift over is of the residue, and not of the fruit of the residue. If it vested, the intention is most singular; that if the grandsons should [* 540] die at the age of three and four years, it * should be a vested interest, till it shall be seen, whether the grand-daughter, younger than both of them, does or does not attain the age of twenty-one or marry; subject to be divested, if neither of those events takes place; that the two shares vesting in the surviving grandson shall go to his personal representative; but that representative shall not for seventeen years together know, whether he shall ever become entitled to those two shares. To such an interpretation the Court must be driven by the narrow language of the will. *Scott v. Bargeman*, 2 P. Wms. 69, bears out all these points; but is not so strong on account of the express reservation of the fruit of the legacy in this instance. I admit the cases of necessary implication; and that the Court has refused to apply it to personal property, because there was a person to take, namely, the next of kin: but all these cases go upon the particular circumstances of the will; and the question is, whether the person is entitled to take it under all the circumstances. There are no express words against the grand-daughter: the general intention is in her favor; and the intention, the Plaintiff attributes to the testator, is impossible. The cases upon cross remainders in real property were argued, not upon the nature of the property, but upon different principles, the intention to keep the whole property together, till a given event: an intention, which is expressed in this will. It is not necessary, that the testator should mean the whole estate to go together: one part might be taken at one time; another at another: but the Court not being able to impute such an intention are driven to find another; and it is a fallacy to say, you are inserting any thing in the will by implication: you are declaring what the testator himself inserted in the will.

In the course of the argument the Lord CHANCELLOR [LOUGHBOROUGH] threw out the following observations:

The first position of the Master of the Rolls is, that by the manner of giving this it was a vested interest in the grandson: he then proceeds to argue, whether there are words to enable him to take it away. I doubt that foundation; whether it is possible to make a vested interest in respect of the gift over to Bundy. Nothing is so adverse to the intention. The terms of this disposition beyond a possibility of doubt point to what was in the mind of the testatrix.

She meant, as far as she could, to follow the law. The [* 541] situation of * the family, the relation of the parties, are all to be taken into consideration. She had two grandsons by a deceased son, and one grand-daughter by a deceased daughter, all infants. She provides for them as such; takes care of their maintenance and the preferment of the grandsons: then upon the supposition, that they fail, the whole of her fortune goes to the person that in that event would be her next of kin. The inequality is for

the most obvious reasons: she puts them in the place of their parents. Then is it possible in that view, in which the will speaks distinctly, to hold these vested interests? The question is, whether, where I see the intention as plain as day-light, there is any rule of construction as to personal property to compel me to make a decree subverting the intention and contrary to conscience. *Nicholls v. Osborn* differs in all points: there was no accumulation: no allowance for maintenance: the interest was not disposed of. The cases upon cross-remainders apply very strongly in favor of the grand-daughter. My reasoning upon it is, that the same ground, upon which the Courts have held themselves bound to raise cross-remainders, will apply in cases of personal estate to supply a limitation, that is in the nature of a cross-remainder. The reasoning, upon which the Courts have held, they could supply the want of words for cross-remainders, apply equally to the case of personal estate. All the cases of cross-remainders (1) go distinctly upon this ground: that the Court inserts limitations, not expressed in the will, upon the ground, disclosed by the will, that the general intention requires the insertion of such limitations, in order to carry on the general plan; and it is very remarkable, that in *Camber v. Hill*, 2 Str. 969, where the Court of King's Bench attempt a distinction, which has not been since approved, between that case and *Holmes v. Maynel*, they particularly recite, that that decision is perfectly right upon the circumstance, that the whole is given over. Most of the cases turn upon that point. In *Robinson v. Hicks*, Lord Hardwicke was strongly of the opinion, that prevailed afterwards at law; but thought it advisable to send it to a Court of Law stating it as a legal devise.

Aug. 14. Lord CHANCELLOR. The general plan of this will is so extremely obvious, that it is impossible to have any doubt as to the general scope of the intention. The testatrix had three grandchildren: two boys by a deceased son; one girl by a deceased daughter; all very young; and these children were the natural objects of *her affection. It is very evident, that [*542] the sole purpose of the will was to make a provision for these grand-children, such as might be most beneficial to them, with an extremely natural view, that one or other of them would be possessed of all her fortune: but it was a possible event, from their age, that none of them might arrive at the time, when it would be material for them to be possessed of it: and in that event it was natural

(1) See Mr. Butler's note, Co. Lit. 195, b, note 1; Mr. Sanders's note to *Davenport v. Oldis*, 1 Atk. 580, and 2 Woodes. 210; Searjeant Williams's note, 6; 1 Saund. 185; *Wright v. Holford*, *Pery v. White*, *Phipard v. Mansfield*, Cowp. 31, 777, 797; *Doe v. Cooper*, *Doe v. Worsley*, 1 East, 229, 416; *Doe v. Burville*, *East-er Term*, 13 Geo. III., 2 East, 47, n; *Doe, on dem. Gorges v. Webb*, 1 Taunt. 234. The old rule, that cross-remainders cannot be implied between more than two, is exploded; and the rule, that has succeeded, is, that they may be raised by necessary implication between more than two; but the presumption is the other way; between two the presumption is in favor of cross-remainders. *Ante*, *Burnaby v. Griffin*, 266; *post*, *Green v. Stephens*, vol. xii. 419, xvii. 64; *Horne v. Barton*, xix. 306; *Coop. 257*; *Mogg v. Mogg*, 1 Mer. 654.

to substitute the nephew, if he should be alive ; or if not, his children. For this purpose she puts the children and her fortune under the management of the persons, she appoints executors : she directs them to dispose of the residue of her property, in order to form an income : the application of that income is to give maintenance to each of these grand-children upon that portion, that would ultimately belong to that child : with a power as to the grandsons to advance out of the income what should be necessary for preferment. The preferment of the grand-daughter was her marriage ; upon which she became entitled to one third with the accumulation. With regard to the others, as they were brothers, descended from the son, survivorship is distinctly expressed between them : likewise it is distinctly expressed, that in case the grand-daughter shall die under the age of twenty-one or unmarried, her share with the accumulation shall go to the grandsons, and in case of the death of either to the survivor.

The will is not by any means accurately drawn. It is of necessity to explain one part of it by another : for instance ; there is a different mode of giving the interest to the grandsons and to the grand-daughter : to the former it is by gift and direction for payment : it is merely a gift to the grand-daughter. That is mere mistake. So in one instance there is no disposal of the accumulation. That also is pure mistake, and an inaccuracy in the drawer of the will ; for it is very clear, that all was to go over, that was not expended in maintenance. As to the grand-daughter, either her marriage or attainment of the age of twenty-one would have fixed the interest in her ; and not only according to the frame of the will, but the clear scope of the intention, her marriage or attainment of that age would have totally defeated the gift over to the nephew. Upon that event the personal representative of the surviving [* 543] grandson, who in the event is the representative * of both, claims to be entitled to two thirds of this fortune, as vested in the survivor of the grandsons : the grand-daughter contends, that she is entitled to the whole : the nephew is brought in as a party : I do not know why ; for the claim of his family is completely barred. As between the Plaintiff and the grand-daughter the question is purely a question of intention : both claim under the will : both must find therefore in it some express direction or some necessary implication to give to the one or the other of them. A third case may happen, that never can be a question of intention ; that if the disposition of the will has been imperfect, and a case has existed, in which any part of the property is undisposed of, not according to the intention, but contrary to the intention and by a slip in the will, the personal representative or next of kin would be entitled.

His Honor has adopted that construction of the will, that vests the interest in the surviving grandson. It is therefore necessary to consider, whether I can find in this will any spark of intention to vest this interest in two thirds of the bulk of the fortune with the

accumulation in a grandson dying under the age of twenty-one. First, it is an obvious remark, that it is an excessively whimsical, extravagant and absurd intention ; because it is quite evident, that *quoad* the nephew, the postponed object of bounty, who was to take nothing in respect of the prior interest of the grand-children, there could be no vested interest in any one dying under twenty-one ; for if all died under twenty-one, the nephew was to take all. The supposition therefore, that vests it in the grandson dying under twenty-one, which could not possibly take effect with regard to the nephew, vests it solely for the purpose of taking it from the grand-daughter. It seems, his Honor felt himself under this sort of difficulty : apprehending, that there were some certain words in the will, that forced him to put the construction upon it of a vested interest in the grandson, and that there was nothing, that would afterwards take it from him ; that in the first conception of the phrase there was to each of the three grand-children an express gift, and that payment only was postponed ; and that there was an express gift over in the event of the death of the grand-daughter, but no express gift over in the event of the death of the grandsons. Then it comes to that rule, that one meets with in many cases, and which never is treated with great respect, and in which the Court has rather followed the authority of another jurisdiction ; namely, where a testator says, "I give at twenty-one" and where he gives, payable at twenty-one (1). There is not much difference in it : but the Court has followed it as to personal legacies ;, certainly not * as to real [* 544] estate (2). It is not a rule founded upon any principle of interpretation : but it is a positive rule ; and as such I should feel myself under the same difficulty, that other Judges have felt, who finding it a positive rule of the Ecclesiastical Court have thought it better to adhere to it : but it must be confined to such cases ; and so confined I should feel myself bound to follow it. But when one reads this will, it is very true, if you take the will to pieces, and stop at the first part of the disposition without going on to the close of it, there is a gift to the grandsons, to be paid to them respectively upon their attaining their ages of twenty-one years : to the grand-daughter she gives at the age of twenty-one years or day of marriage : the distinction therefore would not apply to the case of the grand-daughter : but there is clearly no difference in the sense. But what is given ? You must not rest upon the letter of the will, and take the first part without going through the other. Nothing is given to either the grandsons or the grand-daughter but maintenance. The income only is the subject of disposition in this part of the will ; and that income is only charged with maintenance. The income is not given. That is all the subject of the gift till the period of majority, or the marriage of the grand-daughter ; and then only commences the disposition of the principal. Therefore it is a

(1) *Batzford v. Kebbell*, *ante*, 363 ; and the note, 364. *Post*, vol. vi. 245.

(2) *Pearce v. Loman*, *ante*, 135.

necessary term, that the person to take shall be a grandson in a state of majority or a grand-daughter in a state of majority, or having married. This brings it within a very sensible line taken by Lord Thurlow; whether marriage, or attaining the age of twenty-one, or any other personal qualification, is not a necessary part of the description. Therefore the rule, that embarrassed the Master of the Rolls, does not fetter the Court. I am perfectly clear, as he also was, that it could not be the intention to vest the interest in a grandson, to carry it over to the personal representative, who happened here to be grand-father, which was not intended in the case of the nephew's interest taking place. Therefore concurring with him in this wish, but differing as to the capacity of the Court to execute it, I must reserve that part of the decree, that declares this a vested interest.

Then comes the other question: which has more difficulty. I think however, it is very evident, and so evident as to amount to necessary implication, that the grand-daughter takes the [* 545] whole. The * whole is given over to the nephew, in case neither the grandsons nor the grand-daughter should attain the age of twenty-one, or the latter be married. The nephew cannot take a part. The whole fund with all the accumulation must go to him in every case, in which he can take. For what purpose then is the intention to give it to the nephew defeated but for this plain and evident purpose, that he in a remote degree of relation and affection was to take nothing to the prejudice of either of the grandchildren? He is preferred to the personal representatives and the next of kin. That necessarily implies, that what defeats the gift over to the nephew must be a disposition of the whole to the preferable objects of the testatrix's bounty named; and I think, the inference against a partial intestacy is quite a necessary inference and a clear implication in favor of the grand-daughter.

Therefore reverse so much of the decree as declares, that two thirds vested in the surviving grandson; and declare that the whole is to be paid to the grand-daughter. I do not dismiss the bill; for it would stop the account (1). —

SEE, *ante*, the notes to S. C. 3 V. 236.

(1) *Bolger v. Mackell, Parsons v. Parsons*, *post*, vol. v. 509, 578; *Skey v. Barnes*, 3 Mer. 335.

WILLIAMS v. CHITTY.

CHITTY v. CHITTY.

[1797, JUNE 28, 30; AUGUST 15, 16.]

DOWER barred by settlement previous to marriage, but during the infancy of the wife, of stock and leasehold property, partly the husband's, partly the wife's. (a) Real estates devised held liable to simple contract debts under a direction in the beginning of the will, that debts and funeral expenses should be first paid: that, which descended to the heir by the failure of the devise, to be first applied, (b) [p. 546.]

Devise to A. and her heirs: but if she dies under twenty-one and unmarried, to B. and her heirs: A. dies in the life of the testator, under twenty-one and without issue, but having been married: the heir is entitled. [p. 546.]

No difference between debts and legacies in an implied charge upon real estate by will, [p. 551.]

By settlement made previously to the marriage of Joseph Chitty and Sarah Cartwright in 1771, Sarah Cartwright assigned a leasehold messuage in Berkeley-square belonging to her, held under a lease for ninety-nine years, dated 16th July, 1737, and Joseph Chitty assigned a leasehold messuage in Bond-street belonging to him under a lease, dated 30th of March, 1768, for forty years, renewable every fourteen years, to trustees, their executors, &c. for the resi-

(a) It has been settled, after some difference of opinion in England, that a female infant may bar herself, by her contract before marriage, of her right to dower in her husband's lands, and to her distributive share of her husband's personal estate, on the ground of its being a provision by the husband for the wife's support. It was considered to be a bar, *a provisione viri*, and not *ex contractu*; and the assent of the wife was held not to be an operative circumstance, though the ante-nuptial contract was executed by the infant in presence of her guardian. *Drury v. Drury*, 5 Bro. P. C. 4; Bro. Ch. 506, and notes; 2 Kent, Com. 244 (5th ed.); 4 Ib. 56. So any equitable provision settled upon an infant in lieu of dower, and to take effect immediately on the death of the husband, and to continue during the life of the widow, and being a reasonable livelihood for her under the circumstances, has been held to be a bar. *M'Cartee v. Teller*, 2 Paige, 511; S. C. 8 Wendell, 267; *Corbit v. Corbit*, 1 Sim. & S. 612; 1 Hilliard, Abridg. 108. The question still remains, whether she has the capacity to bind her own real estate by a marriage settlement, 2 Kent, Com. 244. But see the decisions which affirm that an infant is not bound by his covenant. *Sandfor v. M'Lean*, 3 Paige, 117; *Colcock v. Ferguson*, 3 Dess. 482; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *Lester v. Frazer*, Ril. Ch. 76; S. C. 2 Hill, Ch. 541; 1 Story, Eq. Jur. § 240. And it has been expressly ruled, that a relinquishment of dower by a *feme covert* infant is an act in *pais*, and may be avoided on arrival at full age. *Oldham v. Sale*, 1 B. Munroe, 77.

(b) The settled doctrine, in a case like the present, seems to be that the debts constitute, by implication, a charge on the real estate; for whether the direction be in the introduction or in any other part of the will, that all the debts of the testator shall be paid, or the devise be of his real estate after the payment of all his debts; it is deemed equally clear, that he intends, that all his debts shall be paid; which, in case of a deficiency of his personal assets, can be done only by charging his real estate. 2 Story, Eq. Jur. § 1246; *Graves v. Graves*, 8 Sim. 43; *Dove v. Gregory*, 10 Simons, 393; *Parker v. Marchant*, 1 Y. & Coll. N. R. 290. For the exceptions to this rule, see 2 Story, E. J. § 1247. On the distinction between the funds from the personalty and realty, see *ante*, note (a) to *Kidney v. Cousmaker*, 1 V. 436. But lands are now liable for simple contract debts in England. *Ante*, p. 117, note (a) *Manning v. Spooner*.

due of the respective terms, in trust to permit Joseph Chitty to receive the rents for life; and after his decease to permit Sarah, his intended wife, to receive the rents for life; and in case she should die in his life without any child, in trust to assign the house in Berkeley-square to Joseph Chitty, his executors, &c. for [* 546] * the residue of the term; and to assign the house in Bond-street according to the appointment of the said Sarah by will or writing, and, for want of appointment, in trust for her executors, &c.; and in case she should survive her said husband, and there should be no child then alive, in trust to assign both the said houses to her for the residue of the respective terms; but in case there should be one or more child or children living at the death of the survivor other than an eldest son, in trust to sell the said houses, and to pay the money among such younger sons equally; and if but one, to such only younger child; but if only one child, to assign the houses to such only child; and it was declared, that the sum of 1500*l.* 3 per cent. Bank Annuities, which was purchased by Joseph Chitty with part of the portion, he was to receive, and with his own money, was transferred to the same trustees, upon trust to permit Joseph Chitty and Sarah his intended wife, to receive the dividends during their lives and the life of the survivor; and if the said Sarah should die in the life of her said husband without leaving any child, upon trust to transfer the same to Joseph Chitty, his executors, &c.; and if there should be living at the death of the survivor any children except an eldest son, to divide the said annuities between such children equally, and if but one, to such only younger child; and if but one child, to such only child; and it was declared, that the provision thereby made for the said Sarah should be in full of her jointure and in bar of dower.

Joseph Chitty by his will, dated the 30th of November, 1782, ordered and directed all his just debts and funeral expenses to be first paid; and then reciting, that by the will of his late uncle, Josiah Chitty deceased, his freehold and copyhold estates in Essex, whereof he had not barred the remainders, would descend to his eldest son, the testator declared, he therefore did not make any provision for the said son by that his will other than as thereafter mentioned: but having in order to make some provision for his younger and other children barred all and every the remainders in and by his said uncle's will limited of the estates in London thereby devised to him in tail, he gave, devised and bequeathed, all his messuages, ground, hereditaments and premises, in London, to his wife and Adam Jellicoe and their heirs, upon the trusts and for the uses therein declared concerning the same: that is to say; as to his two messuages in Lombard-street, in trust to and for the use of his daughter Sarah Chitty, her heirs and assigns; but in case of her [* 547] * decease under twenty-one and unmarried, in trust to and for the use of his daughter Elizabeth Chitty, her heirs and assigns: but in case of the decease of both his said daughters under twenty-one and unmarried, to the use of his eldest son Joseph Chitty, his heirs and assigns for ever; and as to his messuage called the Golden Leg

and Star in Fleet Street, in trust to and for the use of his said daughter Elizabeth Chitty, her heirs and assigns, subject as after mentioned: but in case of her decease under twenty-one and unmarried, then to the use of his said son Joseph Chitty, his heirs and assigns; and in case his said daughter Elizabeth should by the death of her sister Sarah under the age of twenty-one and unmarried come into possession of his two messuages in Lombard Street by virtue of his will, then he revoked the devise of the Leg and Star, and it was his will, that his said trustees and their heirs should stand seized of the said two messuages in Lombard Street to the use of his said daughter Elizabeth, her heirs and assigns, subject as after mentioned, and of the said messuage called the Leg and Star to the use of the said Joseph Chitty, his heirs and assigns for ever; and as to all his other messuages or tenements, hereditaments and premises, in London aforesaid, he thereby declared, that the said trustees should stand seised thereof to the use of his said daughter Elizabeth Chitty, subject as after mentioned, and of all other his children other than an eldest or only son born or to be born, being sons at twenty-one, and daughters at the like age or marriage, which should first happen, in equal shares and proportions as tenants in common and not as joint-tenants, and their respective heirs and assigns: but in case his said daughter Elizabeth should by virtue of his will come into possession of the said two messuages in Lombard Street by the death of her said sister as aforesaid, then that his said trustees and their heirs should stand seised of his said other messuages in London to the use of all his children other than his said daughter Elizabeth and his eldest or only son born or to be born, being sons at twenty-one and daughters at the like age or marriage, in equal shares, as tenants in common and not as joint-tenants, and their respective heirs and assigns. The testator then after giving directions for the maintenance and education of his children, not exceeding 100*l.* a year, and appointing his wife guardian, and in case of her decease Adam Jellicoe and his wife, and in case of their decease such person as the survivor should appoint, ordered and directed, that the said Adam Jellicoe should have the management of his estates during his children's minority; and that it should be lawful for *him and [*548] the testator's wife to let leases of any of the said messuages at a rack rent not exceeding twenty-one years in possession, and to repair and improve the same, as they should think most for the benefit of the persons interested therein, and to deduct out of the rents, all such charges as should be incurred relative to the said messuages, with 30*l.* per annum to Adam Jellicoe for his care of the estates; and that the annual savings of the rents of the said estates should accumulate, and from time to time, as often as they should amount to a competent sum, be laid out in Government or real securities for the benefit of his said children; with a discretionary power to the trustees to place out or advance any child out of such child's presumptive share of such savings. All the residue of his personal estate including arrears of rent he gave to his wife, her

executors, &c. ; and appointed her and Adam Jellicoe his executors. He then declared, that in case of the decease of either of his trustees, it should be lawful for the survivor to appoint one or more trustee or trustees ; and it was his will, that in case his son Joseph should die under twenty-one without issue, then his next and eldest son should succeed to the same estate before given to the use of the said Joseph ; and that the shares of such of his younger sons, who should become an eldest son, in the estates before given for the use of his other children, should go to them in equal shares ; and that such eldest son should only stand in the place of the said Joseph Chitty, his heirs and assigns ; and in case all his children should die under twenty-one and unmarried, then it was his will, that the said messuages in London should go to the persons, who would have been entitled thereto by the will of his uncle, in case the remainders had not been barred.

Adam Jellicoe died in the life of the testator. The testator's daughter Sarah also died in his life under twenty-one and without issue, but having been married. The testator died in 1795 ; leaving four children, Joseph, (a) Elizabeth, Charles, and Marian ; all under the age of twenty-one.

The first bill was filed by creditors of the testator by simple-contract for an account of the personal estate ; and in case it shall not be sufficient to answer the debts, that the deficiency shall be made good by sale of the real estates devised and charged with the payment of debts. The second bill was filed by the widow to have the interests of the children ascertained ; an account of [* 549] the debts, *funeral expenses and personal estate, of the testator ; that the deficiency of the personal estate to answer the debts may be raised by mortgage or sale of the real estate ; and that she may be declared entitled to dower and free bench.

The causes coming on for farther directions, the questions were ; 1st, whether the real estates were charged by the will with the debts ; secondly, whether in the events, that happened, the devise over to Elizabeth Chitty of the two houses in Lombard-street was good ; or whether these houses descended to Joseph Chitty as heir at law ; and if so, thirdly, whether those premises were not liable before the estates devised to the other children ; supposing the real estates charged with the debts.

The second question was given up by the Solicitor General for Elizabeth Chitty.

As to the question of dower the Master reported, that the estates,

(a) It is supposed that this is Joseph Chitty, the author of numerous practical works on law, which are in extensive use in the profession ; among which are the Treatises on Pleading ; Bills of Exchange ; Criminal Law ; and the Practice of the Law in all its Departments. It is said that he was first destined to the profession of medicine, in the study of which he made some advance ; but, like Sir James Mackintosh at about the same period, he abandoned it for the law. During the latter years of his life, he was an invalid. He died in London, Feb. 11th, 1841, aged 65. It appears from the present case that in 1795 he was under 21. His work on Bills of Exchange was published in 1799, when, as it would appear, he was 23 years of age.

of which the testator died seised in fee-simple or fee-tail, were of the annual value of 1031*l.* 13*s.* and that the annual value of the leasehold messuage and Bank annuities comprised in the settlement is 152*l.* The Master stated some evidence of reputation, that Sarah Chitty was an infant at the time of her marriage; and that he did not find by any positive evidence that she was then under age; but if she was, he was of opinion, she was not entitled to dower or free bench. The widow excepted to the report.

Attorney General [Sir John Scott] and Mr. Hart for the Widow, Mr. Mansfield and Mr. Stratford, for the Creditors. Supposing, the widow was under age, there is this difference between this case and *Drury v. Drury* (1): there the guardian consented; here there was no guardian. There is no case, where the guardian was not a party. If the trustees had suffered the leases to expire, or had exhausted the stock for renewal, she would have been without a provision: but in *Drury v. Drury* the covenant of the husband was sufficient to bind all his lands.

The real estate is charged with the debts: *Hatton v. Nichol*, For. 110. *Bowdler v. Smith*, *Trott v. Vernon*, Pre. Ch. 264, 430. *2 Vern. 708. *Cloudsley v. Pelham*, 1 Vern. 411. [* 550] *Harris v. Ingledew*, 3 P. Wms. 91. *Lord Godolphin v. Penneck*, *Thomas v. Britnell*, 2 Ves. 271, 314. This testator did not mean to part with any of his property, till his debts were paid. Unless this real estate is charged, he has not charged any of his property, which would not otherwise be liable.

Solicitor General [Sir John Mitford], Mr. Grant, and Mr. Holford, for the Children. The reasoning in all these cases, where the testator introduces the devise by directing, that all his debts shall be first paid, does not apply to this case. The real estates, that he could so charge, he has given as a provision for his younger children. He has expressly stated the reason for barring the intail of one part of his estate and not of the other. He could not mean his younger children to bear the whole burthen out of their share, while the eldest son would avoid any part of it. All the directions for maintenance, for letting the estate during minority, an allowance for trouble in receiving the rents, &c. are utterly inconsistent with the idea, that these estates are charged so that they may be sold or mortgaged. He calls his personal estate residue. In cases, that have the words "all my worldly estate" the whole estate is evidently in contemplation. In *Brydges v. Landen* (2), Chan. 26th January, 1786, 31st October, 1788, the testator directed "*imprimis* that all my debts and funeral charges and expenses be in the first place paid by my executors hereinafter named. Then as to all my real and personal estate I dispose thereof as follows;" and after that dispo-

(1) 5 Bro. P. C. 570; 4 Bro. C. C. 505, *n*; Mr. Hargrave's note, Co. Lit. 36, *b.* *n*; *Carruthers v. Carruthers*, 4 Bro. C. C. 500; 1 Fonb. Tr. Eq. 74. *Post*, *Smith v. Smith*, *Clough v. Clough*, vol. v. 189, 710, and the note, 717; *Milner v. Lord Harewood*, xviii. 259.

(2) Cited, *post*, vol. vii. 210, 211.

sition he charged and made liable all his real and personal estate with two sums of 150*l.* to each of his daughters. All the cases were considered by Lord Thurlow; who was clearly of opinion without hearing the Counsel for the son, that the debts were not charged. The circumstance, that the debts were to be paid by the executors was considered very important. In *The Attorney General v. Moore* the executor was also devisee of the real estate (1); which was the ground of *Cloudsley v. Pelham*. There is no one case, in which the determination has been, that the real estate should be charged, unless there were words showing, the testator meant the disposition, he subsequently made, to be subject to the debts. *Davis v. Gardiner*, 2 P. Wms. 187. *Rightley v. Rightley*, ante, Vol. II. 328.

[* 551] *Reply.* *In the case in Forester there was great reason to think, the testator had in view only personal estate, and the limitations were as repugnant to the idea of a sale or mortgage as this will. It does not depend upon any particular intention of the testator: but as it is just, the Court lays hold of those words, because the testator has misconceived the amount of his fortune: as in *Kidney v. Coussmaker*, ante, Vol. I. 436, Vol. II. 267 (2): it is impossible to read the will without seeing, that the testator thought himself dying a rich man. It cannot depend upon such general words as "all my worldly estate." There is no case without some words of that sort. The inference always is, that a testator means to dispose of all his estate.

The Lord CHANCELLOR [LOUGHBOROUGH] thought the evidence sufficient to prove, the widow was under age at the time of the settlement; but disallowed the exception without hearing the Counsel for the children upon that point. His Lordship also thought the second question very clear.

Lord CHANCELLOR. It is impossible not to entertain a strong wish, that the Court was able to make a man do that, which is morally just. My feeling upon this will is, that there is a total absence of intention as to paying his debts out of the real estate. He desires his debts and funeral expenses to be paid in the first place. Then he gives a historical account of the state of his affairs, and makes a provision very specific; even to directing the *quantum* of maintenance. The disposition of his real estate is formed upon a calculation to keep a proportion between his eldest son and younger children. He clearly supposes, there will be a residue of his personal estate. I do not say, whether I should have adopted the construction in *Trott v. Vernon* and *Hatton v. Nichol*: but I should be extremely glad in a parallel case to follow those determinations. In *Rightley v. Rightley* the Master of the Rolls states a difference between debts and legacies: I do not know how to state a differ-

(1) The Solicitor General cited this from a note of Mr. Brown, the King's Counsel.

(2) That decree has been affirmed upon appeal to the House of Lords. See the note, ante, vol. i. 447.

ence between them (1). I should be very glad to submit to the rule, if I can find it, that wherever there is mention of debts in a will, and that will devises the real estate, that shall throw the debts upon the real estate. *Leigh v. Lord Warrington* (2) is a very strong case; for the personal estate was equal to all the debts except a debt of 1000*l.* and the testator could have no possible idea, *that could be demanded against him; for it was to [*552] be invested in land, of which he would have been tenant in tail, and which by suffering a recovery he could have disposed of. It rather seems, that Lord Hardwicke in *Lord Godolphin v. Penneck* adopted one of the reasons in *Lord Warrington's Case*, that certainly goes to establish as a general rule, that where there is a desire, that the debts shall be paid, and the real estate is devised, the real estates shall be subject to the debts. I shall desire the Register to take out the words of the will in *Lord Godolphin v. Penneck* to see, whether it agrees with the reasoning.

Aug. 15th and 16th. Lord CHANCELLOR. I have had the Register's Book searched for the case of *Lord Godolphin v. Penneck*; and as it was suggested by the Attorney General, that the will might be taken short in the Register's Book, I directed a search for the will: but the will cannot be found. We must therefore take it as it stands upon the Register's Book and in the report; and then, to be sure, it is an authority, that if the testator talks about debts in the beginning of his will, the real estate must be charged (3).

As to the third question, the descended part must be liable before the devised. I look upon it as general assets. In the distribution of assets the Court always applies assets not specifically given to any one, before assets that are specifically given (4).

1. WITH respect to the different operation as to her *freehold*, or as to her *personal* property, which will be effected by the covenant of a female infant, entered into upon occasion of her marriage, see, *ante*, note 1, to *Johnson v. Boyfield*, 1 V. 315.

2. That a court of Equity, will, in favor of creditors, incline to lay hold of any indication, showing that a testator intended to charge his real estate with payment of his debts, if his personalty prove insufficient, see note 1, to *Kidney v. Cousmaker*, 1 V. 436; but the declaration in the principal case, ascribed to Lord Alvanley [ARDEN], that there is no difference between debts and legacies, as to *implying* a charge upon real estate, must not be received without some qualifications; for which, and other matters relative to this subject, see the notes to *Kightley v. Kightley*, 2 V. 328.

(1) *Post*, 739, in *Shallcross v. Finden*; and vol. v. 362, *Keeling v. Brown*, the Master of the Rolls takes notice of this; and adheres to his opinion.

(2) 4 Bro. P. C. 90.

(3) *Post*, *Powell v. Robins*, vol. viii. 209; *Clifford v. Lewis*, 6 Madd. 33; *Sanderson v. Wharton*, 8 Pri. 680.

(4) *Manning v. Spooner*, *ante*, 114; and the note, 118.

DENNISON, *Ex parte.*

[1797, August 15.]

Stock transferred as a security for a floating balance, and under an agreement to continue it transferred and re-transferred by and to the creditor by way of loan: held a sale.

PREVIOUSLY to the bankruptcy of Richard Bruce he had various dealings and transactions as a discount and insurance broker, and had a running cash account, with the petitioners; and being considerably indebted to them, for better securing the money due and to grow due, he upon the 28th of June, 1792, transferred into the name of one of the petitioners as senior partner 5000*l.* 3 per cent. Reduced Bank Annuities; and upon the 13th of July following the farther sum of 5000*l.* like annuities as security for repayment of such sums as the petitioners should be in advance for him. A short time afterwards the petitioners being requested by Abraham [*553] Goldsmith to lend him a considerable sum of 3 per * cent. reduced Annuities transferred stock to sundry persons, nominated for that purpose by Goldsmith; in which transfers was included the 10,000*l.* stock transferred by Bruce. The petitioners often requested Bruce to consent to a sale, that the produce might be applied towards a settlement of their account; but he always objected on account of the low price of the stocks; and requested them to continue the said stock in hopes the stocks might rise, or that he should be able to settle the account without the necessity of a sale; and they several times delivered him his account; wherein the dividends of the said stock were included to his credit, and interest charged of money lent to him, and allowed upon money received and also upon the dividends. Bruce at the time of his bankruptcy was indebted to the petitioners to the amount of 9573*l.* 8*s.* 1*d.* By the direction of the assignees and their solicitor the petitioners sold the 10,000*l.* stock; which produced 4775*l.* leaving a balance of 4204*l.* 15*s.* due to the petitioners. Their proof of that debt was rejected under a suggestion from the assignees, that the petitioners having transferred the said stock in 1792, must give credit for it as a sale at the price of the stock at the day, when it was so transferred, and were only entitled to prove the sum remaining after that credit given. The petition prayed, that the petitioners might be at liberty to prove the said debt of 4204*l.* 15*s.* stating these facts; and that no part of the transaction was considered as a sale by either party: that the petitioners frequently accommodated persons with a loan of stock in a similar way; and had at all times a power of calling for such stock and having it replaced. The petition also stated, that the said stock might have been several times transferred and re-transferred, by and to the petitioners: but such transfers were never considered as sales; and that in all cases of sale a broker was employed: but no broker was employed in this case.

LORD CHANCELLOR [LOUGHBOROUGH]. They did not know, that such transactions of a continuation of stock are disapproved by this Court; and that the Court always considers it as a sale. It was determined in the case of *Andre v. ———*. By the decree in that case, affirmed in the House of Lords, Mr. Andre was made to account for the stock at the value, at which it was upon the day of the transfer, as a sale. It is the risk, to which such transactions are subject. The petition must be dismissed.

THE authority cited by Lord Rosslyn [LOUGHBOROUGH], as a precedent for his decision of the principal case, was, no doubt, *Andre v. Craufurd*, reported in 6 Br. P. C. 444.

BARROW, *Ex parte*.

[* 554]

[1797, AUGUST 14.]

THE bond upon suing out a commission of bankruptcy must be by the petitioning creditor: the commission therefore was superseded on account of his infancy.

THE petition was presented by the Solicitor, who sued out a commission of bankruptcy; and it prayed, that the petitioner might be at liberty to give the bond to the Lord Chancellor; having discovered, since the commission issued, that the petitioning creditor was an infant.

Attorney General [Sir John Scott] and Mr. Hall, for the petition contended that the act (1) did not in terms require the bond to be given by the petitioning creditor.

LORD CHANCELLOR [LOUGHBOROUGH]. Upon looking into the act said, it must be the bond of the petitioning creditor; the same person, who makes the affidavit, must likewise give the bond; therefore the commission must be superseded.

As an infant cannot sue out a commission of bankruptcy against another, so, neither can he be made a bankrupt himself. *Ex parte Adam*, 1 V. & B. 494; *Ex parte Barwis*, 6 Ves. 601.

PARKER, *Ex parte*.

[1797, AUGUST 16.]

THE privilege of a bankrupt from arrests during his examination extends to an attachment for not paying money under an award made a rule of Court.

THE petitioner absconded to avoid paying money reported to be in his hands as assignee in a commission of bankruptcy, and which

(1) 5 Geo. II. c. 30, s. 23.

under an award, made a rule of Court, he was ordered to pay. Upon that act of bankruptcy a commission issued against him. He surrendered under the commission; and as he was going out of Guildhall from his examination, he was arrested under an attachment for the contempt. The petition prayed, that he might be discharged from custody (1).

Solicitor General [Sir John Mitford], Mr. King, and Mr. Wetherell, for the petition. There is no difference between arrests under this attachment and under an execution. This is a mode of execution adopted in this Court for recovering a debt; not like an attachment for not putting in an answer: *The King v. Stokes*, Cowp. 136.

Bartram v. Dannett, Finch, 253, shows the difference. It [* 555] is determined, that *absconding to avoid an attachment for not paying money awarded is an act of bankruptcy; which it could not be, if it was only a criminal process.

Attorney General [Sir John Scott], *contra*. The words of the act are "arrested for debt." In *Ex parte Gibbons*, 1 Atk. 238, it was held, that the bail of a bankrupt might lay hold of him during his examination, and surrender him in discharge of themselves.

LORD CHANCELLOR [LOUGHBOROUGH]. This is merely an attachment to enforce the payment of money. I think, the analogy of all the determinations goes to it.

The bankrupt was discharged (2).

A BANKRUPT, when attending the commissioners, or *bona fide* on his road to, or from such attendance, is privileged from arrest; *Ogle's case*, 11 Ves. 556; and this privilege, being essential to the administration of justice, is independent of any statute. *Ex parte King*, 7 Ves. 314; see, *post*, the note to *Ex parte Hawkins*, 4 V. 691. As to the discharge of an attachment, see the note to *Wheldale v. Wheldale*, 16 V. 376.

(1) 5 Geo. II. c. 30, s. 5; 6 Geo. IV. c. 16, s. 117.

(2) See the note, *ante*, 351.

SITTINGS BEFORE MICHAELMAS TERM.

[38 GEO. III. 1797.]

SHARPE v. EARL OF SCARBOROUGH.

[1797, Nov. 1.]

BOND and judgment assigned: interest must be calculated to the date of the report, so as not to exceed the penalty. (a)

THE Defendant Foljambe excepted to the Master's report for not allowing interest from the 12th of December, 1783, to the date of the report upon a bond, dated the 27th of November, 1779, by the late Lord Scarborough, and Sir George Saville, as his surety, to Lord Nugent in the penal sum of 4000*l.*, conditioned for payment of 2000*l.* with interest upon the 27th of May then next; upon which bond judgment was entered up in the Court of Common Pleas in Michaelmas Term 1779, for 4000*l.* debt and 63*s.* costs; and the said bond and judgment were upon the said 12th of December, 1783, for valuable consideration assigned to the Defendant Foljambe in trust for Sir George Saville.

Solicitor General [Sir John Mitford], and Mr. Lloyd, for the Exception. The Master has stopped in the calculation of interest upon the debt of 2000*l.* at the date of the assignment upon a misapprehension of your Lordship's opinion in *Creuze v. Hunter*, and *Deschamps v. Vanneck*, ante, Vol. II. 157, 716; because this bond-debt was secured by a judgment. The judgment is for 4000*l.* and the execution would be for that sum: and interest ought to be calculated upon the debt of 2000*l.* so as not to exceed the penalty.

Attorney General [Sir John Scott], for the Report, said, it was conceived, the Defendant was only a creditor by simple contract; the assignment being only available in equity; and the legal demand being gone.

LORD CHANCELLOR [LOUGHBOROUGH]. The interest must go on up to the penalty, to be sure (1). The legal demand is the penalty. The execution would be for 4000*l.* I cannot restrain that but upon payment of interest.

Allow the exception.

1. For the cases in which Equity allows interest upon bond debts, beyond the penalties of such bonds, see, ante, note 3, to *Ex parte Mills*, 2 V. 295.

(a) See, ante, p. 157, notes (a) and (b) to *Creuze v. Hunter*; 1 Barbour, Ch. Pr. 515.

(1) *White v. Sealey*, Doug. 49, ante, vol. ii. 168: *Mackworth v. Thomas*, post, vol. v. 329. See cases under special circumstances in the note, 330, and the notes, vol. i. 63, 452.

2. That an equity of redemption is considered equitable assets, as against creditors who have not a right to come in and redeem the mortgage, see note 4 to *Lyster v. Dolland*, 1 V. 431.

[* 558] WAINEWRIGHT v. WAINEWRIGHT.

[Rolls.—1797, Nov. 1.]

BEQUEST by implication. (a)

THOMAS WAINEWRIGHT by his will, dated the 22d of March, 1765, after declaring, that he thereby disposed of what estate the All-wise Director of all things had thought fit to favor him with, and after directing all his just debts and funeral expenses to be fully paid, and giving to his nephews John Wainewright, Robert Wainewright, John Seagrave, and Robert Seagrave, and his niece Elizabeth Seagrave, each the sum of 300*l.* and directing the farther sum of 300*l.* to be placed out on 4 per cent. Bank Annuities for the benefit of his niece Mary Watts and her children, and other 300*l.* for the benefit of his niece Mary Portis and her children, in manner therein mentioned, with remainder over as to both the said legacies to the said Elizabeth Seagrave, he disposed of the residue of his personal estate in the following manner:

“All the rest of my personal estate not hereinbefore disposed I give unto my said nephews Robert Wainewright and John Seagrave whom I nominate and appoint to be my executors upon trust that they or the survivor of them or the executors or administrators of such survivor after all my debts legacies and funeral expenses paid and satisfied do convert the same into money and when so done place the same out on government or other good security in the names of such of my said executors or of the survivor of them the interest and produce whereof not exceeding 20*l.* a year I do hereby direct shall be paid and laid out for or towards the maintenance clothing and education of my great nephew Thomas Wainewright now placed with my nephew Robert Seagrave in Nottingham until he shall attain his age of twenty-one years but with this liberty for my said executors and the survivor of them his executors and administrators to lay out and dispose of any part of the principal so laid out for his benefit and advancement not exceeding the sum of 200*l.* before he shall attain his age of twenty-one years when and as they shall think fit and in case the interest produce of such surplus of my personal estate so directed to be placed at interest shall not be all laid out in any one year for the maintenance clothing and education of my said great-nephew then I will and direct that what so remain be paid and applied to and for the benefit of my nephew Thomas

(a) In illustration of this case, see 2 Roper, Legacies, by White 312, 322, ch. 21, § 7, 9.

Wainewright and his family as my executors and the survivor or his executors and administrators shall judge proper And in case my said great nephew shall *happen to die before he [*559] attains his age of twenty-one years then that my said executors and trustees and the survivor of them and his executors and administrators do and shall pay or apply the whole of the said surplus of my personal estate and the securities whereon the same and every part thereof shall have been placed out together with all interest or dividends accrued due for the same unto and for the benefit of my said nephew Thomas Wainewright and every or any of his family in such shares and proportions and at such time and times as they shall respectively think conducive to the support or other benefit of the whole or any of the branches of my said nephew Thomas Wainewright's family."

The testator died soon after the execution of his will. His great nephew Thomas Wainewright having attained the age of twenty-one filed the bill; praying, that he may be declared entitled to the residue of the testator's personal estate.

Mr. *Graham* and Mr. *Johnson*, for the Plaintiff, contended, that by necessary implication from this will the Plaintiff was entitled to the residue upon attaining the age of twenty-one.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN.] This is very like *Crowder v. Clowes*, ante, Vol. II. 449, which I determined without hesitation; as I think I shall this. In that case there were no words of gift to the testator's niece in case of her marriage after his death. Here there is a necessary implication, that if the Plaintiff does live to attain the age of twenty-one, he shall have the residue of the personal estate. Can any one doubt about it? His death under the age of twenty-one is to give it, over to his father: but if he lives to attain that age, then the testator dies intestate. That is impossible. Is it not a necessary inference, exactly like that in the case, I have cited?

Declare, that the Plaintiff upon attaining the age of twenty-one acquired the absolute interest in the surplus of the testator's personal estate (1).

IMPLICATIONS are not to prevail, in the construction of a will or other instrument, unless such implications are, in some sense, unavoidable; *Upton v. Lord Ferrers*, 5 Ves. 805; *Parsons v. Parsons*, 5 Ves. 582; *Cave v. Holford*, 3 Ves. 676; but it is not to be understood that no implication is to be admitted, which is not absolutely irresistible, from natural necessity; see, ante, note 3, to *Brummel v. Protheroe*, 3 V. 111.

(1) *Post*, 676, *Philipps v. Chamberlaine*, vol. iv. 51; and the note, 59; *Upton v. Lord Ferrers*, V. 801.

MONTGOMERIE v. THE MARQUIS OF BATH.

[ROLLS.—1797, Nov.]

A TRUSTEE laid out the money of different persons on a mortgage: foreclosure by one *cestui que trust* as to his share. (a)

By indentures of mortgage, dated the 22d of September, 1790, the Marquis of Bath and his eldest son Lord Viscount Weymouth in consideration of the sum of 80,000*l.* paid by Andrew Berkeley Drummond and John Drummond, demised to them, their executors, administrators and assigns, certain real estates in the counties of Salop and Hereford; to hold the same to the said Andrew Berkeley Drummond and John Drummond, their executors, administrators and assigns, for the term of 5000 years, under a proviso for redemption on payment of the sum of 80,000*l.* with interest at the rate of 4 per cent. on the 22d of March next ensuing, to the said Andrew Berkeley Drummond and John Drummond, their executors, &c. The sum of 10,000*l.* part of the sum of 80,000*l.* was paid out of the money of Archibald Montgomerie; who resided in the East Indies, and remitted money from time to time to Andrew Berkeley Drummond and John Drummond, as his bankers, with directions to employ it, as they might judge most advantageous to him; and by a deed poll, dated the 22d of February, 1791, reciting the mortgage, and the fact, that 10,000*l.* part of the money so lent in the names of Andrew Berkeley Drummond and John Drummond was not their property, they declared a trust as to 10,000*l.* part of the said sum of 80,000*l.* for Archibald Montgomerie, his executors, &c. The interest was afterwards raised to 5 per cent. by indorsement upon the back of the mortgage deed.

The bill was filed upon the 13th of October, 1796, by Archibald Montgomerie against the mortgagors and Andrew Berkeley Drummond and John Drummond; praying, that an account might be taken of what was due to the Plaintiff in respect of his said one eighth part of the said sum of 80,000*l.* and that the mortgagors might be foreclosed from the equity of redemption of one eighth part of the mortgaged estates; and that in that case the Defendants Andrew Berkeley Drummond and John Drummond might assign to the Plaintiff the said eighth part; and that the receiver of the rents of the mortgaged estates might be appointed.

(a) It seems doubtful if this case can be maintained as law. It may be stated as a general rule, that all persons, who have the legal interest in the mortgage, as well as those, who have the equitable interest therein, are necessary parties to a bill to foreclose. There can be no redemption or foreclosure, unless all the persons entitled to the mortgage money are before the Court. Story, Eq. Pl. § 201. And it has been decided that if the mortgage has been made to a trustee in trust, all the *cestuis que trust* should be made parties, as well as the trustee to the Bill of foreclosure. Ibid. § 210, 212. *Wood v. Williams*, 4 Madd. 186; but see *Goodson v. Ellison*, 3 Russ. 583; *Smith v. Snow*, 3 Madd. 10; *Hutchinson v. Tancred*, 2 Keen, 675.

The bill charged, that the Defendants, the Drummonds, refused to take any step for the purpose of compelling payment of the *said 10,000*l.* or to obtain possession of the mort- [*561] gaged premises or the said undivided eighth part.

The Defendants, the Drummonds, by their answer stated, that 70,000*l.* of the mortgage-money was the property of the several persons and in the proportions therein set forth.

The mortgagor by his answer prayed time for payment of the said sum of 10,000*l.* in case the Court should be of opinion, that the Plaintiff is entitled to call it in; and no opposition being made at the hearing, the usual decree was made according to the prayer of the bill (1).

See, *ante*, note 2, to *Jones v. Smith*, 2 V. 372, that, notwithstanding the decree in the principal case, (where it may be observed, no opposition was made,) it is extremely doubtful, whether a decree for a *partial* foreclosure could now be obtained; see, also, *Cockburn v. Thompson*, 16 Ves. 324, n. It is, at all events, certain, there can be no foreclosure, or redemption, unless the parties entitled to the whole mortgage money are before the Court; *Palmer v. The Earl of Carlisle*, 1 Sim. & Stu. 425; nor unless the mortgagor, or his heir, or, if such heir cannot be found, the Attorney General, is before the Court, so that a good reconveyance can be made: see *M'Donough v. Sheubridge*, 2 Ball & Bea. 564; *Schoole v. Sall*, 1 Sch. & Lef. 177; *Smith v. Bicknell*, 3 V. & B. 153, n.; neither can a *puisne* mortgagee redeem a prior incumbrancer, without making the mortgagor a party to the suit for that purpose; it being always the object of a Court of Equity to make a complete decree, embracing the whole subject, and determining (as far as possible) the rights of all the parties interested. *Palk v. Clinton*, 12 Ves. 58; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 134.

CARR v. EASTABROOKE.

[Rolls.—1797, Nov. 29; Dec. 5, 6.]

A NEGOTIABLE bill of exchange not satisfied by a legacy.

Nothing presumed in favor of the rule, that a debt is satisfied by a legacy equal or greater, (a) [p. 564.]

ROBERT CARR by his will, dated the 11th of December, 1786, among other things gave to Catherine Henrietta Carr, his wife, the sum of 2000*l.* and all his furniture, plate, jewels, linen, books, and other effects, that should or might be in his house at Hampton Wick at the time of his decease, bonds or specialty securities for

(1) See *Lowe v. Morgan*, 1 Bro. C. C. 363, and Mr. Belt's note. Upon a motion under this decree, 6th December, 1799, for enlarging the time for payment the Lord Chancellor expressed great doubt, whether this decree could stand; and would not make an order under it without consent. *Post*, vol. xvi. 324, n; see *Smith v. Snow*, 3 Madd. 10; *Palmer v. The Earl of Carlisle*, 1 Sim. & Stu. 423.

(a) See 2 Williams, Exec. 930, 1016. See the authorities on this point collected and arranged *ante*, p. 516, note (c) to *Hinchcliffe v. Hinchcliffe*; note (a) to *Richardson v. Elphinstone*, 2 V. 463.

the payment of money excepted ; and he appointed her sole executrix.

The decree made on the 14th of May, 1789, directed the usual accounts of the testator's personal estate, debts, legacies and funeral expenses. By the Master's report it appeared, that the testator on his last voyage to India, remitted to his wife the following draft :

"Canton, Nov. 10th 1785 Messrs. Hoare and Co. pay Mrs. Catherine Henrietta Carr or her order the sum of 500*l.* for value received. Robert Carr."

The report stated the following circumstances. A letter from the testator to his wife, dated the 10th of January, 1786, contained the following paragraph :

"The money I have remitted you by bills I would have you purchase in your own name 3 per cent. Bank Stock to make good that sold out and left you by your dear father and aunt."

At the time of the arrival of this draft there was not [*562] sufficient money in the *bankers' hands for the payment of it. The testator arrived from India the latter end of July or beginning of August 1786 ; and the money paid in by the testator to Messrs. Hoare on the 24th of July, 1786, previous to his death on the 14th of December following, arose from East India Company's bills and certificates discounted by them for the testator. The draft of 500*l.* was not paid during the testator's life-time ; but remained in the hands of the Defendant, his widow ; who married John Eastabrooke.

Henry Martin, father of the Defendant Catharine Henrietta Eastabrooke, by his will dated the 27th of March, 1779, directed a farm and other hereditaments to be sold, and the produce to be added to 1000*l.* 4 per cents. and invested in trust to pay his said daughter the yearly produce or interest for her life independent of any husband, she then had or might thereafter have ; and after her decease to be equally divided among her children ; and for want of issue, or if all should die under twenty-one, then the whole, (except 500*l.* specifically bequeathed), to such person as his said daughter should by will made without the control of her husband in the presence of three witnesses appoint ; and for want of such will, to her right heirs for ever ; and the testator gave his wife 1000*l.* 3 per cent. stock ; and appointed her one of his executors and sole residuary legatee of his real and personal estate ; and the testator added the following codicil, dated the 14th of September, 1779 :

"My wife signifying to me that she wished if it was in either of our powers to assist and to give to Mr. R. Carr being then under a necessity and want of a thousand pounds to satisfy the demands of his creditors thought proper to transfer one thousand and two hundred pounds 3 per cents. for his use which I had willed to my wife by will hope she will not be displeased for my so doing, it being absolutely at that time necessary for both him and his wife's credit."

Prudence Lawson, aunt of the Defendant Catherine Henrietta Eastabrooke, by her will, dated the 16th of April, 1780. gave to her

said niece, her executors and administrators, all the residue of her personal estate ; and appointed her sole executrix.

* Elizabeth Martin, mother of the Defendant Catherine [* 563] Henrietta Eastabrooke, prevailed upon her to sell out 500*l*.

Bank Annuities, part of the personal estate of Prudence Lawson bequeathed to the Defendant, and the money arising from such sale was given or lent by the Defendant to her then husband Robert Carr.

At the death of Robert Carr a balance of 927*l*. 3*s*. 7*d*. remained due to him from Messrs. Hoare ; which balance was on the 20th of December, 1786, received under a letter of attorney from the Defendant Catherine Henrietta Eastabrooke ; who claimed by her discharge to retain besides her legacy the sum of 500*l*. for the amount of the said draft as a payment made to her, and the fund being insufficient for the legacies, a petition was presented, praying, that it might be declared, that the said sum of 500*l*. ought to be considered as part of the personal estate of the testator applicable to the payment of the legacies.

Mr. Cox, for the Petition, contended, that this was to be considered as a debt, and extinguished by the legacy of 2000*l*. and that upon the circumstance of the husband and wife living together, the husband must have known that the draft had not been received. He cited *Fowler v. Fowler*, 3 P. Wms. 353.

Mr. Piggott, for the Defendant, argued, that the instrument being negotiable, this was not like the case of a debt.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN] dismissed the petition : but at the request of the Counsel for the petition the order was suspended.

Dec. 5th. Mr. Hardinge, for the Petition. This was a debt up to the death of the testator, at his death, and afterwards ; and therefore is adeemed by the gift of a superior legatory sum. It must be taken out of the general rule by proof not presumption : but the presumption from the cohabitation is, that the testator knew the draft had not been negotiated.

MASTER OF THE ROLLS. The only question is, whether, supposing he had left her nothing, her indorsee could come upon his assets. It is admitted to be that sort of debt, that, if not cancelled, as it is said to be, by this legacy, would have been a debt to any person, * to whom it was indorsed. If so, I think [* 564] it is not that sort of debt, that would be cancelled by a legacy : nor have I found any case, in which a demand upon such a negotiable note has been considered satisfied by a legacy. Why am I to presume that he did not know, that his wife had, the moment she received the bill, indorsed it upon the trusts of the letter that accompanied it ? It might have been received at any time. It must depend upon the fact, whether it is a debt, not whether it was negotiated. It was put in her power to make the debt due to any other person. I am still of the same opinion, that the rule cannot apply to such a security as this, if it was an available security. If the wife or indorsee could have demanded it, I am of opinion, the

legacy is not a cancellation of it. If it could not have been demanded, the Master ought not to have reported it as a debt. I will presume nothing in favor of such a rule as this. I will reconsider it.

Dec. 6th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I have reconsidered this case; and I still remain of the same opinion. There are two grounds; First, if it had not been accompanied by the letter, which clothes this remittance with trusts, but had been simply a negotiable note, I have met with no case, which has decided, that a legacy to the payee of a negotiable security is an extinguishment; for then it must depend upon this fact, whether the original payee has negotiated it or not, before the date of the will. *Simpliciter* a legacy to a creditor of equal or greater amount than the debt is an extinguishment: but the Court has not gone farther. I cannot carry the rule farther, and hold a legacy to be an extinguishment of a negotiable security.

But independent of that, this bill was not a voluntary bill: but the purposes, it was to answer, are declared by the letter and the other circumstances. He does not appear to be making a present of it to his wife, but to discharge a debt, that he owed. *Lawson v. Lawson*, 1 P. Wms. 441, I think, furnishes principles for this. I cannot therefore grant the prayer of this petition; and it must be dismissed (1).

1. THE satisfaction of a debt, by a legacy, is a presumption not favored; see, *ante*, note 2, to *Barclay v. Wainwright*, 3 V. 462.

2. That, where the simple question in a suit is, the claim of a wife to a separate maintenance, a Court of Equity will not be disposed to interfere; see the notes to *Ball v. Montgomery*, 2 V. 191.

(1) *Chancey's Case*, 1 P. Wms. 408, and Mr. Cox's note. *Ante*, 466, 529.

ROWTH v. HOWELL.

[1797, Dec. 9.]

EXECUTORS directed with all convenient speed to pay debts and lay out the residue in mortgages held not answerable for a loss by the insolvency of the testator's banker, after selling negotiable securities deposited with him by the testator. (a)

Receiver not liable by the failure of the testator's banker at Bristol, with whom the receiver when going to London to pass his accounts, deposited the money, intending to draw for it, (b) [p. 566.]

THE testator directed his executors with all convenient speed to convert all his property into money, and to apply the same first in paying his debts; then to lay out the residue in mortgages; which subject to certain annuities, he gave in fourths to four nieces; who filed the bill against the executors Howell and Hodgson, to charge them with a loss to the testator's estate. The facts were, that the testator had used Richard Gravatt as his banker; and had great confidence in him. At the death of the testator, stock, navy bills, East India bonds, Scotch bonds and other negotiable securities, part of the testator's property, to a considerable amount were standing in the name and in the hands of Gravatt, transferred and indorsed to him by the testator. Howell lived in the country, and relied upon his co-executor Hodgson, a solicitor in London; who soon after the testator's death opened an account with Gravatt as to the securities in his hands; and he sent the banker's book to the father of the Plaintiffs. The executor also entered into a treaty for a mortgage; which was delayed by difficulties as to the title. In the mean time Gravatt without the knowledge of the executors, sold several of the

(a) A trustee is to keep the trust property, as he keeps his own. Therefore if he should deposit money with a banker in good credit to remit it to the proper place by a bill, drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible. 2 Story, Eq. Jur. § 1269, and English cases cited. Where a trustee acts by other hands, either from necessity, or conformably to the common usage of mankind, he is not to be made answerable for losses. *Ibid.* *Clough v. Bond*, 3 Mylne & Craig, 490; 2 Williams, Exec. 1292. But where a trustee places money in the hands of a banker he should keep it separate, and not mix it with his own in a common account; for if he should so mix it, he would be deemed to have treated the whole as his own, and he would be held liable to the *cestui que trust* for any loss sustained by the banker's insolvency. 2 Story, E. J. § 1270; *Massey v. Banner*, 4 Madd. 416; see also *Salway v. Salway*, 2 Russ. & M. in which case Lord Brougham held (overruling the decision of Sir John Leach, 4 Russ. 60,) that a receiver appointed by the Court is answerable for the loss of moneys consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund. This judgment was afterwards affirmed in the House of Lords, *White v. Baugh*, 9 Bligh. 181. The trustee must guard against contingencies by paying in the money to the account of the trust estate, and not to his own credit. Lewin, Trusts, 300, ch. 16, § 2. And he must so manage the trust moneys, that they may be earmarked, so as to become specific assets to the credit of the trust. *Ibid.* 323, ch. 16, § 4, pl. 2.

(b) See Lewin, Trusts, 322, 323, ch. 16, § 4, pl. 2.

securities, and upon the 2d of July, 1796, he sold four of the East India bonds. The day after that sale Hodgson drew upon him on account of the East India bonds: upon which he confessed what he had done; and begging for time, promised to replace the securities, he had disposed of: but the executor commencing an action immediately against him, he soon afterwards destroyed himself, and died insolvent. The bill charged wilful neglect and default in the Defendants in not taking steps to prevent Gravatt from making an improper use of these securities. There was evidence of a recommendation from the testator to his executors not to be in a hurry to take his affairs out of the hands of Gravatt; for he was a very honest little man.

Attorney General [Sir John Mitford,] Mr. Mansfield, and Mr. Fonblanque, for the Plaintiffs, contended, that the will was a command upon the executors to close the account with the banker; and they might have prevented him from making an improper use of these securities, by having them filled up in their own names; or if filled up in his name, by having them delivered up.

[* 566] * *Solicitor General* [Sir John Mitford], for the Defendants. Trustees using the same care, the testator did, are not answerable for a loss arising from the crime of another man. The loss originated in the confidence of the testator; which enabled Gravatt to dispose of these securities. *Churchill v. Lady Hobson*, 1 P. Wms. 241. 21 Vin. tit. Trust, 534.

LORD CHANCELLOR [LOUGHBOROUGH]. There is nothing in it. The banker was possessed by the testator's act of disposable securities. What possible security could the executor have taken better than he did, short of filing a bill and bringing all the securities into Court? If he had taken them to his chambers, he would have been liable to any casualty that might have happened. If he had deposited them with his own banker: one banker has as good credit as another. Mr. Dickins has supplied me with a very strong case: *Knight v. The Earl of Plymouth*, (1) before Lord Hardwicke, 9th April, 1747. The receiver appointed in the cause placed in the hands of a banker at Bristol 1500*l.* when he came to London to pass his accounts, asserting his intention to draw for that money specifically; thinking it safer to place it there than to bring or send it up; the banker was the testator's; who had constantly used the house, for the purpose of drawing as he wanted. The house was in credit at the time, but failed, before the receiver passed his accounts. Lord Hardwicke was clear, he was not blamable; and would not affect him with the loss. It came on upon the petition of the receiver, and there was a good deal of discussion upon it. The Defendants therefore cannot be charged (2).

THE case of *Knight v. Lord Plymouth*, upon the authority of which Lord Rosslyn [LOUGHBOROUGH], rested his decree in the principal case, is reported in

(1) 1 Dick. 120; 3 Atk. 480.

(2) *Balchen v. Scott*, ante, vol. ii. 678, and the note, 679.

3 Atk. 480, and in 1 Dick. 120, but Lord Eldon has observed, "he should not much fear to contradict that case," if the receiver paid the money into the banker's hands on his individual account; or, at all events, unless it was a single transaction, so that the money was ear-marked, and not mixed up with the receiver's private account; *Wren v. Kirton*, 11 Ves. 382; and see note 2, to *Hilliard's case*, 1 V. 89; it is upon the point last mentioned, that such cases seem, in great measure to turn; *Massey v. Banner*, 4 Mad. 419; *S. C.* on appeal, 1 Jac. & Walk. 247; but where an agent has transacted business in the regular and usual manner, he will not be answerable for any loss sustained. *Adams v. Claxton*, 6 Ves. 228; *Bacon v. Bacon*, 5 Ves. 335; *Belchier v. Parsons*, 1 Keny. Rep. 47.

STEPHENSON v. CHISWELL.

[1797, Dec. 14.]

A JOINT creditor by simple contract may go against the assets of a deceased partner; but cannot before the account retain separate property of that partner in his possession. (a)

THE bill stated, that Richard Muilman French Chiswell, and Henry Nantes, merchants and copartners, kept cash with the Plaintiffs as bankers of the said partnership; and Mr. Chiswell also kept a separate account with the Plaintiffs. In the year 1796 the partnership frequently overdraw their account; and the Plaintiffs having complained thereof to Chiswell, he sent to the Plaintiff Stephenson the following letters:

"Dear Sir: Mr. Nantes has given me a full explanation of our being short in cash; which has been occasioned by the extreme scarcity * of money; by which goods cannot be [*567] sold, or only on long credit; and also large sums due from Dutch commissioners, which the Treasury have guaranteed us the payments. We are however making arrangements to prevent it as much as possible in future. However I am to thank you for the aid, you have given; at the same time beg leave to request the favor, and such I shall really esteem it, that you will allow us a few discounts; and which Mr. Nantes will not ask you for but in some particular cases, and your compliance will very much oblige," &c.

"Dibdin-Hall, 14th Aug. 1796."

(a) There can be no set off of joint debts against separate debts, unless there be some special agreement between the parties to that effect, or some equitable circumstances, creating it in the particular case. Story, *Partnership*, § 395. The joint estate and the separate estate constitute separate funds. *Ibid.* § 376. But every partnership debt is joint and several; and, in the event of the decease of one of the partners, resort may be had primarily for the debt to the surviving partners, or to the assets of the deceased partner. 1 Story, *Eq. Jur.* § 676; *Wilkinson v. Henderson*, 1 M. & K. 582; *Thorpe v. Jackson*, 2 Y. & Coll. 553; *Brailhoite v. Britain*, 1 Keen, 219; *Hammersley v. Lambert*, 2 Johns. Ch. 509. The separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim any thing; which can be accomplished only by the aid of a Court of Equity; for at law a joint creditor may proceed directly against the separate estate. 2 Story *Eq. Jur.* § 675; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Tucker v. Oxley*, 5 Cranch, 34; see also 3 Stephens, *Nisi Prius*, 2408.

"Dear Sir: I have received the favor of your letter; and acknowledge myself extremely obliged for the accommodations, you have had the goodness to show to my house. A disappointment in the receipt of some money was the occasion; and I can assure you, it was quite unexpected. I am certain that Mr. Nantes will this week discharge the advance. I should have come to town, but really fixed appointments on public business, prevents it at this present moment. I have to intreat the favor of your kindness; and for which I shall most thankfully acknowledge it.

"Dibdin-Hall, 18th Dec. 1796."

Mr. Chiswell died on the 3d of February, 1797; having made his will, and appointed his wife, the Defendant, executrix. A commission of bankruptcy issued against Henry Nantes, as the surviving partner, on the 11th of February, 1797. At the death of Mr. Chiswell the partnership were indebted to the Plaintiffs in the sum of 15,000*l.* and upwards: and upon the separate account of Mr. Chiswell there was a balance in the Plaintiff's books to the amount of 401*l.* 2*s.* 5*d.* in favor of Mr. Chiswell.

The aforesaid letters being written to the Plaintiff Stephenson by Chiswell in his own separate name, and the Plaintiffs having made the aforesaid advance to the partnership upon the faith thereof, the Plaintiffs are entitled to retain the aforesaid sum of 401*l.* 2*s.* 5*d.* the balance of the separate account of Chiswell, towards satisfaction thereof; and if not, they are entitled to receive satisfaction of the said joint demand out of the said separate estate of Chiswell, in case such separate estate should be sufficient to satisfy all said creditors; but if the same should not be sufficient, then to receive [* 568] *from his executrix such satisfaction as the said estate will afford rateably with all the other creditors; and therefore they are entitled to hold the aforesaid balance, until it shall be ascertained, whether they are entitled to retain the whole thereof, or until it shall be ascertained, what sum such proportion will amount to. A suit has been instituted in this Court against the Defendant Mary French Chiswell, as executrix of Mr. Chiswell; and a decree has been made, directing an account of his personal estate, debts, and funeral expenses; and Plaintiffs intend to prove their said demand in the said suit: but the Defendant has commenced an action against Plaintiffs for recovery of the said balance on the separate account of Chiswell.

The bill prayed a discovery; and that the Defendant may be restrained from proceeding at law, until it shall be ascertained, whether the Plaintiffs are entitled to retain the whole or any and what sum out of the said balance in satisfaction of their said demand; and that they may be at liberty to retain the same accordingly; the Plaintiffs offering to pay to the Defendant what it shall appear they have no right so to retain.

The Defendant put in a general demurrer.

Attorney General [Sir John Scott], Mr. Mansfield, and Mr. Hubbersty, for the Demurrer. If this bill admits the Defendant's right

at law to recover the separate estate of her testator from the Plaintiffs, then they must go upon the equitable ground, that being joint creditors they have a right against that separate estate: but that will not support the bill; for they may go in before the Master, in the other suit. It is not stated, that there are no bond creditors.

Mr. Piggott and Mr. Alexander, for the Plaintiffs. The Defendant refuses all discovery. Suppose, she admitted assets to pay all, or only to a greater amount than the sum in the Plaintiff's hands, is it possible to deny, that the Court then has a case before it, the equity of which would require that this sum should not be taken out of the Plaintiffs' hands? It cannot be denied, that the discovery is material either to the relief prayed by this bill, or to the suit already instituted, in which there is a decree. It is material to this bill, because it depends upon the facts stated in the answer, whether, the Court will permit the Plaintiffs to retain this sum. It is * possible to say, such a case may not be stated, as will [* 569] induce the Court to authorize the Plaintiffs to retain. They have at least shown a title after the discovery to go in and prove under the decree; but beyond that, if the executrix should admit assets, or sufficient to answer this, a clear title to retain. The money will be taken from the Plaintiffs, before they can establish their right before the Master. They have a right to an equitable set-off. There has been a mutual dealing. They trusted the partnership upon the credit of Chiswell's separate account. As to bond creditors, there are none: but it would make no difference; as there is a great real estate, upon which the Court will turn them. The Defendant undertakes to say, that in no possible way of answering can the Plaintiffs be entitled to retain. The question is not, how the Court will mould the remedy to be given to the Plaintiffs, but whether the bill shall be sustained at all. The principle is admitted by the Attorney General, which is fully established by *Primrose v. Bromley*, 1 Atk. 89. *Simpson v. Vaughan*, 2 Atk. 30. *Bishop v. Church, Jacomb v. Harwood*, 2 Ves. 100, 371, 265; that though the right of action at law is against the surviving partner, (who is however stated by this bill to be a bankrupt) yet the joint creditor has a clear right to come into equity against the representative to have payment of the demand out of the assets of the deceased partner.

Reply. It is not suggested, that Chiswell's estate will be incompetent to pay them their whole debt. They pray, that because they offer to pay what may appear due from them, the Court will allow them to keep what the bill admits they cannot at law keep. This sum being *ex confesso* part of the separate estate, it must be paid to the separate estate; and they may claim *pari passu* with the other separate creditors according to the degree of their debt.

LORD CHANCELLOR [LOUGHBOROUGH]. The Plaintiffs have a right in equity to go immediately upon the estate of Chiswell, if they think fit (1). This right of retainer against an executor taking legal steps

(1) See *post*, *Gray v. Chiswell*, vol. ix. 118; *Ex parte Kendall*, xvii. 514; *Devaynes v. Noble*, 1 Mer. 529.

to be purchased with the said 6000*l.* by the will of Arscot Bickford the elder were to be settled on any after-taken wife of Arscot Bickford Peppin and his issue by such wife, in case his first wife should die without issue; and that an account may be taken, &c.

The Defendant Arscot Bickford demurred to the whole bill, except so much as charges assets of George Bickford, and prays an admission thereof or any discovery, answer or satisfaction, for the estate and effects of George Bickford come to the hands of the Defendant; and by his answer he denied, that there were assets.

Attorney General [Sir John Scott], Mr. Mansfield, and Mr. Hall, for the demurrer.

Solicitor General [Sir John Mitford], and Mr. Short, for the Plaintiff were stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. If the wife had died within a month after the marriage, there could have been no issue to take the provision; and the legacy of 6000*l.* except as to the life-interest of the nephew would in effect have lapsed. It is impossible to ascribe such an intention to the testator.

Over-rule the demurrer.

SEE, *ante*, note 3 to *Perry v. Woods*, 3 V. 204, as to the disinclination which a Court of Equity feels to put such a construction upon a will as would lead to the probability of a lapse.

GORDON v. ROTHLEY.

[1797, Dec. 16.]

DEFENDANT on motion ordered to pay in a balance ascertained by the report.

THE *Attorney General* [Sir John Scott] moved, that the Defendant, who was of the age of eighty-eight, should pay into Court the sum ascertained by the Master's report to be the balance due from him.

The motion was opposed by Mr. Mansfield, Mr. Grant, and Mr. Wishaw, as contrary to practice.

[* 573] * LORD CHANCELLOR [LOUGHBOROUGH]. I have no hesitation in saying, it would be extremely beneficial, if whenever a balance is ascertained, it should be paid in immediately. It would have the best effect in accelerating the farther directions, and save the vast expense of costs. The parties spin it out, while they have the advantage of keeping the money. Here also from the age of the Defendant there is danger of an abatement. Therefore let it be paid in.

THOUGH the Court will always be disposed, upon the grounds stated in the principal case, to order a balance to be paid in, when it is ascertained by the Master's report, and not controverted; yet, if the report is excepted to, the money

will not be ordered into Court before the exceptions are argued: in a proper case, however, the hearing will be advanced. *Creak v. Capell*, 6 Mad. 115. And it should be observed, that by a bill now pending in Parliament, "for the improvement of the administration of justice in the Court of Chancery," it is proposed to be enacted, that no exception shall be taken to the report of a Master upon any matter of account, in respect of any item contained in such account, unless such item alone, or together with any other item or items depending on the same question, shall amount to fifty pounds at the least; unless the Master making such report shall certify his opinion, that the question, with respect to such item, involves some principles of law or Equity which, in his judgment, renders it expedient that the same should be considered by the Court. It is also proposed, that any party excepting to a Master's report, shall deposit the sum of ten pounds, instead of five pounds, as at present required; such deposit to be paid to the adverse party if the exception shall be overruled, and farther costs to be in the discretion of the Court.

ROGERS v. KIRKPATRICK.

[1798, JAN. 16.]

DEFENDANT, in confinement under sentence for felony, cannot be brought up by *habeas corpus* upon an attachment for want of an answer. (a)

IN consequence of what passed upon the former application to the Court, (*ante*, 471.) Mr. Stanley for the Plaintiff on the first day of Michaelmas Term moved for a writ of *Habeas Corpus* to bring up the Defendant. The Register declined drawing up the order on the ground of irregularity; upon which Mr. Stanley on this day repeated the motion; stating the particular situation of the Defendant; who was confined for three years in the House of Correction at Preston in Lancashire under a sentence for felony; and the return of the Serjeant at Arms was read.

LORD CHANCELLOR [LOUGHBOROUGH], having conferred with the Register, directed the order not to be drawn up; adding, that the Defendant could not be removed by the process of this Court out of his present place of confinement until the expiration of his sentence (1)

SEE, *ante*, the notes to S. C. 3 V. 471.

(a) See *ante*, p. 470, note (1) to S. C.

(1) See *Attorney General v. Smith*, 1 Dick. 135; *post*, *Errington v. Ward*, vol. viii. 314; *Lloyd v. Passingham*, xv. 179; *Moss v. Brown*, 1 Ves. & Bea. 76, 306.

BURN v. BURN.

[1797, DEC. 5, 6; 1798, JAN. 29.]

JOINT bond held several against creditors in the administration of assets. (a)

Joint bond held several in bankruptcy, [p. 575.]

Partners bound by an instrument executed by one in the presence of the others, (b) [p. 578.]

Agreement for a mortgage a specific lien against creditors, (c) [p. 582.]

THOMAS MAYNE, Edward Mayne the elder, and Edward Mayne the younger, carrying on business in co-partnership as merchants at Lisbon, were in August, 1785, indebted to Doctor Burn in the sum of 25,244*l.* 18*s.* 5*d.* on a balance of accounts; and three bonds were executed by Thomas Mayne; one for the sum of 7030*l.* 7*s.* 7*d.* and interest; another for the like sum and interest: and the third for the sum of 11,184*l.* 3*s.* 3*d.* and interest. The bond for the last-mentioned sum was in the following form:

"Know all men by these presents that we Mayne and Co. of the

(a) "I conceive," says Mr. Baron Alderson, "that partnership trading debts are only one, and that the most frequent case of the general rule, which is, that wherever a Court of Equity sees that in a contract, joint in form, the real intention of the parties is, that it shall be joint and several, it will give effect to such intention." *Thorpe v. Jackson*, 2 Y. & C. 553. See this topic considered, *ante*, p. 399 note (a) to *Thomas v. Frazer*.

(b) If executed in the presence and with the assent of the other partners, it shall be deemed the deed of all. Story, Partnership, § 120; *Mackay v. Bloodgood*, 9 Johns. 285; *Halsey v. Whitney*, 4 Mason, 232. See *Smith v. Winter*, 4 Mees. & Welsby, 454. This seems to be an application of the old rule of the common law, which makes a deed, executed by an agent in the presence of his principal, the deed of the latter, although the authority to do it is merely by parol. *Ibid.* Story, Agency, § 51. In a case where the instrument is not executed in the presence of the partners, the English decisions require a prior authority under seal, or a subsequent ratification under seal, to make the execution valid. 3 Kent, Com. 47, 48, (5th ed.) But the more general doctrine in the United States is, that a prior authority, or a subsequent ratification, not under seal, but either express or implied, verbal or written, is sufficient to establish a deed, as the deed of a firm, and binding upon it as such. *Skinner v. Dayton*, 19 Johns. 512; *Cady v. Shepherd*, 11 Pick. 400; *Gram v. Seton*, 1 Hall, 262. In the last case all the English and American authorities bearing on the subject are examined at great length.

(c) In equitable mortgages by the deposit of title-deeds, the deposit is evidence of an agreement to make a mortgage, which will be carried into execution by a Court of Equity, against the mortgagor and all who claim under him, with notice, either actual or constructive, of such deposit having been made. See 4 Kent, Com. 150, 151, (5th ed.) *ante*, note (a) to *Ford v. Peering*, 1 V. 72; 2 Story, Eq. Jur. § 1020. But this doctrine is not ordinarily applied to enforce parol agreements to make a mortgage, or to make a deposit of title-deeds for such a purpose; but it is strictly confined to an actual, immediate, and *bona fide* deposit of the title-deeds with the creditor, as a security, in order to create a lien. *Ibid.* There is generally no difficulty in Equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, whenever that is a matter of agreement, at least against the party himself and third persons, who are volunteers, or have notice. For it is a general principle in Equity, that, as against the party himself, and any claiming under him voluntarily, or with notice, such an agreement raises a trust. *Ibid.* § 1231. See also *Delaine v. Keham*, 3 Dess. 74.

city of London merchants are held and firmly bound unto the Reverend Doctor James Burn of London in the sum of *22,368*l.* 6*s.* 6*d.* good and lawful money of Great Britain [* 574] to be paid to the said Rev. Dr. James Burn or his certain attorney executors administrators or assigns for which payment to be well and faithfully made we bind ourselves our heirs executors and administrators firmly by these presents, sealed with our seal dated this 1st day of September in the year of our Lord 1785 The condition of this obligation is such that if the above bounden Mayne and Co. their heirs executors or administrators shall and do well and truly pay or cause to be paid unto the above-named Rev. Dr. James Burn his executors administrators or assigns the full sum of 11,184*l.* 3*s.* 3*d.* good and lawful money of Great Britain and that in the City of London and at and against the 1st day of September 1786 years with the lawful interest at 5 per cent. per annum from the date hereof until payment then this obligation to be void otherwise to remain in full force Mayne and Co. Signed sealed and delivered (no stamped paper used here) in the presence of William William-son Patrick Scott."

The other two bonds were in the same form. Edward Mayne the elder died in March 1786. The business was carried on by the surviving partners under the same firm until the beginning of the year 1790; when they became and were declared insolvent. The bill was filed by Dr. Burn, who was one of the executors of Edward Mayne the elder, praying, that the Plaintiff may be declared a specialty creditor on the estate of Edward Mayne the elder by virtue of the said bonds, and may be paid or permitted to retain what shall appear to be due to him out of the estate of Edward Mayne the elder in a course of administration; and if he cannot be admitted as a specialty creditor, then that he may be admitted as a creditor by simple contract on the estate of Edward Mayne the elder.

The evidence was very full as to the intention, that each partner should be severally bound; and that the bonds were filled up as joint bonds through mistake and the ignorance of the parties. It appeared that Edward Mayne the elder settled the account; and, Dr. Burn pressing for payment or security, Edward Mayne the elder proposed, that he and the other partners should give three bonds; in consequence of which the said bonds were executed as an additional security; that they were executed by Thomas Mayne, *only because his name stood first in the firm: but he ex- [* 575] ecuted them with the privity of the other partners; who were present at the execution. The intention that each of the partners should be bound, was fully admitted by a letter from the survivors.

The claim of the Plaintiff was resisted by the simple-contract creditors of Edward Mayne the elder.

Attorney General [Sir John Scott], *Solicitor General* [Sir John Mitford,] and Mr. Stratford, for the Plaintiff. This cannot be distinguished from the late case of *Thomas v. Frazer*, (*ante*, 399), and the cases in bankruptcy there stated. Your Lordship held, that you

would act upon what was the agreement, and give the instrument that effect in Equity, which it was intended to have. In *Ball v. Dunsterville*, 4 Term Rep. 313, a deed executed by one partner in the presence of the other was held to bind the other. If these are not joint and several bonds, the security is diminished instead of being increased. In *Bishop v. Church*, 2 Ves. 100, 371, Lord Hardwicke entering particularly into this subject as to the heir says, there is the same equity against him as against the personal representative; and that if a Court of Equity has allowed the equity and set up the bond, they have always set it up, not only partly, against the personal estate and executor, but against the heir also.

LORD CHANCELLOR [LOUGHBOROUGH]. Is there any case where it has been done against creditors? It is in bankruptcy; because they are all equal. I have no doubt of admitting it as a debt upon the real assets in consequence of the equity upon a contract to have a real security: but my difficulty is, how I can make it a preferable debt as against the simple-contract creditors of Edward Mayne; who are not bound by any equity. Against him, or any one standing in no higher character than he does, you would have a decree: but as against his creditors, I doubt. It amounts to this; that it was the intention to give and take a security, that would give a preference: but there is a slip. It is a contract to make a security to bind the land; which being made would give a preference: but it rests only upon contract.

For the Plaintiff. Where money is lent, and there is a contract for a mortgage, if the party dies without making the mortgage, and the estate descends to the heir as assets for specialty debts, [*576] that *contract is superior to the right of those specialty creditors. In the case of Sir *Simeon Stewart* (1), which has been before Lord Thurlow and your Lordship, such a contract was determined to take place of an actual conveyance in favor of those specialty creditors. Sir Simeon Stewart was indebted to Mr. Willis, a clergyman in his neighborhood, who pressed him for some security. Sir Simeon Stewart sent him a letter engaging to make a mortgage upon some part of his Hampshire estates. Between the date of that letter and his death he had made a conveyance to trustees for the payment of all his debts. The questions were, 1st, whether there was a sufficient contract for a mortgage: 2dly, whether it should take place of the trust. Mr. Willis filed a bill for that purpose. Another cause was instituted for a general account and distribution of the assets. A decree having been pronounced in that cause, Mr. Willis stayed proceedings in his own cause, and went in before the Master; who was directed to state the particulars and to make a separate report. The question upon that was, whether Mr. Willis had a right to stand as a mortgagee in preference to the general creditors; and it was held, that general creditors could not stand in any other way than the person, from whom they claimed at

(1) Stated 2 Sch. & Lef. 381.

the time, the act was done in their favor; and therefore were bound by all the equity, to which he was liable. It was therefore held a mortgage from the date of that letter; and was classed prior to judgment creditors. The question of notice was certainly agitated; but the answer to that was, that it could not apply to general creditors. Courts of Equity constantly control the effect of judgments subsequent to a contract for the sale of the estate.

Mr. *Grant* and Mr. *Cox*, for the Defendant. If the Plaintiff succeeds, the simple-contract creditors must be totally disappointed. He is at most entitled to come in as a simple-contract creditor of Edward Mayne the elder. He is mistaken in supposing, he has got what constitutes a specialty debt; and therefore is under the necessity of applying to the Court. No party is mentioned in this instrument: no specific person executing it: but it is executed as a sort of corporate act. They assume a corporate capacity, that does not belong to them. In *Ball v. Dunsterville* the persons were described. Does the seal add any thing to it? Is it any thing more than the recognition of a debt from the partnership, settling the account and acknowledging the balance? It is not mentioned in any part to be the bond of any of these persons. *It no where [*577] appears upon any parol evidence, who the persons intended were. Perhaps it is doubtful, whether such evidence as this is admissible. In *Thomas v. Frazer* each of the partners subscribed the bond, and put his seal to it. This is therefore the bond of none of them; but only an acknowledgment under their hand, that such a balance is due.

Admitting this instrument to be a bond, it is too late now to contend, that a joint bond is never to be considered as several: but the question is, whether the Court is required upon any equitable grounds to give that relief in the present instance? In the cases in bankruptcy the Court only says, it is evidence of a debt from the bankrupt against his separate estate. There is no occasion to go farther and to enter into the nature and quality of the debt; and I admit, if they get rid of the first objection, they will be entitled to come in as creditors of Edward Mayne the elder; the debt not being extinguished by taking the bond. The case of the agreement for a mortgage must be upon the ground, that in this Court the agreement is equivalent to a mortgage; the instrument not being necessary. The mortgage not being executed, there could be no flaw; it was not defective as a legal security: if so the Court would not rectify it in order to cut out other creditors. Where is the equity to rear this up into a good specialty security, which it is not, in order to cut out all the other creditors?

Reply. This is such a description of persons as is tantamount to naming them. The instrument would operate as a specialty at law; but the action must be against the surviving partners. *Ball v. Dunsterville* is an authority for an action upon it as a specialty. The declaration did not aver, that it was the seal of both. A declaration might be framed upon this in the same manner as a bond; that they

all three agreed, that Thomas Mayne should write the name of Mayne and Co. to denote them all. Deeds of composition and other regulations of property are hardly ever signed by all the partners, but thus, "A. and Co." It would be very serious, if he, who did not sign, was let off for that reason. The material circumstance is, that we come upon the foot of an agreement under hand and seal; which under the circumstances ought to be considered as an agreement with each and every of these persons, that we should have a specialty to affect each of them. In *Bishop v. Church* [*578] the Plaintiffs were held entitled to be specialty creditors * in a contest with the executors; who represent all general creditors, whether by specialty or simple contract. The decree against the executor, that they shall be considered as specialty creditors, means nothing but as against other creditors. In *Acton v. Peirce*, 2 Vern. 480, the Lord Keeper says, the bond, if set up, must be wholly and entirely set up; therefore it must bind the real and personal assets as a specialty. In *Robert v. Clifford* and other cases of a joint covenant by father and son upon a marriage agreement, though joint at law, this Court set up the covenant, not merely as a personal demand against the covenantor, who was dead, but gave that demand precisely as if it had been joint and several. The cases in bankruptcy apply in some degree; because it is certainly against creditors. He, who is a creditor at Law, has an Equity to say, they have taken a joint instrument at law, and they shall not make it several to his prejudice. If a bill had been filed in the life of Edward Mayne the elder, he must have executed a joint and several bond; and the mere accident of his death cannot alter the equity as against those, who represent him. The demand subsisted in Equity from the moment the transaction was entered into upon the common principle in the case of the purchase of an estate. An agreement for a mortgage by a testator would be specifically executed against all, who represent him; and to the effect of taking part of the real assets from the specialty creditors; because from the moment of the agreement the estate was specifically bound; and it is a question between creditors, who have contracted for a specific lien, and those, who have not. In *Pye v. Daubuz*, 3 Bro. C. C. 595, tenant in tail having mortgaged, with a covenant for farther assurance, died; the mortgagee prevailed against creditors. I may also mention the cases in bankruptcy, at least upon the deposit of deeds.

LORD CHANCELLOR [LOUGHBOROUGH]. In *Ball v. Dunsterville* one of the partners in the presence of the other put his name to the bond and executed it. The other standing by, I think, the Court was right in holding, that it was not necessary, both should hold the paper. The evidence here is, that Edward Mayne the elder was present at the execution.

Upon the other point, I do not think, that any case goes quite up to the point in this. In *Bishop v. Church* the question was not brought forward as affecting simple-contract creditors. There was real estate: and the point, to which Lord Hardwicke's attention was

turned, was, whether the heir was bound. Then he increased the assets by bringing in the real estate.

The *Solicitor General* referred the Lord CHANCELLOR to the case adverted to by Lord Hardwicke as to the simple acknowledgment of a debt under seal binding executors; though not the heir, unless specifically named in the obligation; and he observed, that it was laid down in Roll. from a case in the Year Books, adopted in Wentworth's Office of Executor; and he cites Dyer; and the same thing is alluded to in the case in Vernon.

The cause stood for judgment; and on the 26th of January, 1798, the Lord CHANCELLOR again expressed his doubt, whether the instrument could be reformed against creditors; and desired it to be spoken to again.

Jan. 29th. Solicitor General, for the Plaintiff. It is a general rule, that wherever a right in Equity attaches against any person, that equitable right binds all persons claiming under or against that person, who have not specific liens upon any part of his property. General creditors are in all cases bound by a particular Equity. That is the constant practice in all cases of agreement whatsoever. I have a copy of the decree in *Bishop v. Church*; which was framed with a great deal of care and accuracy, and is preserved among Sir Thomas Sewell's manuscripts as one, that was extremely well penned. An account was directed of what was due upon those bonds; and it was declared, that the Plaintiffs should be considered as creditors by specialty for what should be found due. An account was directed of what had been received under the bankruptcy of one of the obligors, to be deducted out of what should be found due for principal and interest. Then an account was directed of the personal estate of James Church, the other person, who ought to have been severally bound; and it was directed, that such personal estate should be applied in payment of what should be found due to the Plaintiffs for principal, interest and costs, as aforesaid, in a course of administration; and in case that should not be sufficient to answer the Plaintiff's demand, it was declared, that the real estate descended to the heir was liable, and next his * real estates [* 580] devised; which were not devised for payment of debts, but in a course of settlement.

This is decisive. In all cases, where the Court has thought it should not be paid in a course of administration, it is always so provided; as in the case of voluntary bonds; it is always directed, that other debts shall be paid in a course of administration; and that such bond shall be paid after all other debts and before legacies. That is the form of the decree. The effect of this decree would be, that if any of the money was applied to simple contract debts, those payments must be disallowed, and the executors must have been charged with assets. Therefore it was injustice to the executors, unless it was considered as a specialty debt. It was set up as binding, just as if the bond had been right at first. The mistake being reformed, it was reformed generally against all persons.

In *Acton v. Peirce*, though there was no deficiency of personal assets, the language of the Court was, that, when it was allowed to be set up as an effectual instrument, it was set up *in toto*. The point was very fully discussed in *Simms v. Barry*, Finch, 413, reported 2 Ch. Ca. 225, by the name of *Sims v. Urry*, and in 2 Freem. 16, as an anonymous case. The last is by far the best report of it (1). According to that the Court said, it should have all the effects of a bond. In Chancery Cases there is a passage, that shows what was discussed: "the executor could not pay it without a decree without a *devastavit* to other creditors." From the Register's Book it appears, that the bill alleged, that there was a mistake in preparing the bond: that it ought to have been *quadringentis* instead of *quadraginta*; that the bond was intended to have been in the penalty of 400*l.* to secure 180*l.* The Defendant disputed, whether any money was due. The decree declares, that upon reading the proof and condition of the bond and long debate of the matter it did fully appear, that there was an agreement and account between the parties; and the sum stated and agreed upon to be due was 180*l.* and the bond was given for securing the payment thereof; therefore it was ordered, that the bond do stand as a good bond as of the day it bears date, and for the sum of 400*l.* to pay [* 531] *180*l.* the Court declaring, the personal assets shall be first applied in satisfaction thereof; and what the same shall fall short shall be paid out of the real estate; and this bond, upon which judgment is this day given in Equity, shall take place of any other bond, of which judgment is not given before this Term. The case is also in Lord Nottingham's manuscripts. The true name is *Simms v. Barry*.

This makes out the principle, that with regard to general creditors, though not against specific liens, it may be set up. No discussion upon it is to be found in any other case than these two; in which it is certainly decided.

Mr. *Grant*, for the Defendants. This point is absolutely determined by either of the cases mentioned; and there is no other. It is said, the Court has no alternative: but the case of a voluntary bond shows, that is not so; for a voluntary bond is postponed to simple-contract creditors for valuable consideration. They come here upon an Equity to give to a bond an effect, it would not have at Law. The Court may give that upon conditions. The day before this suit was instituted it is clear, this fund was divisible among the simple-contract creditors. The cases in bankruptcy do not bear upon this; for the Court there has no alternative. If the bond is set up for any purpose, the obligee must be permitted to prove it against the bankrupt's estate. There is no middle course there;

(1) The Solicitor General observed, that Mr. Freeman's notes, though not of much reputation, are better than they are supposed to be; that the character, they had, arose from their being stolen by a servant, and published without the privity of the family. The Lord Chancellor said, they were generally good. Lord Mansfield has also mentioned them favorably.

for no term could be imposed, that would not defeat his claim as a simple-contract creditor. In *Bishop v. Church* it does not appear, that there was any deficiency of assets. It is probable from the period between the death of Church and the time of filing the bill, that no other debt remained. It was the only debt apparently claimed against the estate. It is too much to infer from Lord Hardwicke's phrase, that he was to be considered as a specialty creditor, that he meant all those consequences; that any payment made in all those seven years should be overhauled. If he had meant all that, he would have expressed it. It was not suggested in argument, that there were any simple-contract creditors, who would be prejudiced. So in *Thomas v. Frazer* there was no suggestion, that it was a deficient estate, or that it would be any prejudice to simple-contract creditors. In *Simms v. Barry* it appears at all events there was a good bond. All the Court was to do, was to reform it as to the amount. Being a mere mistake of one Latin word for another, perhaps it could have been recovered upon at law by means of some averment without *coming here. [*582] It would have been difficult for the Court to reform the bond, and to let it take place of the simple-contract creditors as to 40l. and not as to the rest. Here it is admitted, that this bond will exhaust the estate. The question is, whether this Court giving them equitable relief may not impose that condition upon them not to take it to the prejudice of other creditors? This Court considers it as inequitable, that bond creditors should exhaust the estate; and adopts the principle of an equal division in all cases of equitable assets. Here are two contending Equities. They have no claim whatsoever upon the assets of Edward Mayne the elder, unless the bond is reformed.

Reply. The bond in *Simms v. Barry* could not have been recovered upon at law. The rule established by a very old case in Croke (1) is, that an averment may be admitted, if the word has no sense; but not, where it has a meaning. It cannot be averred that "40" means "400."

LORD CHANCELLOR. I had a doubt upon this; and it remained upon my mind from the time it was first argued. It seems rather harsh by the interposition of this Court after the death of the party to change the situation of the creditors; the general inclination being for an equal division, wherever the Court can get at it by bringing in the assets for equitable administration. I do not think *Bishop v. Church* decisive; as it does not appear to have been a contest with creditors; though the penning of the decree plainly carries with it the idea, that the bond reformed should carry all the effect of a bond. It also struck me, that nothing more was demanded by this Plaintiff than what the Court has in several instances done; as where there is an incomplete agreement for a mortgage, this Court after the death of the party, and when all their engagements are to

(1) See *Walter v. Pigot*, Cro. Eliz. 896; *Parry v. Dale*, Cro. Jac. 146; *Yelv.* 95; *Hob.* 146.

be arranged, has given a specific lien; as in the late case upon Sir Simeon Stewart's affairs (1), where that mortgage was to stand with regard to a judgment. But *Simms v. Barry* evidently marks, that the Court there had the point distinctly under their consideration; and in consequence of the opinion then entertained and the language in many cases, though it has not been specifically determined, that it must be set up *in toto*, I am satisfied, the course of

[*583] *the Court has been understood to be so from that time to this; though none of us (and I have taken some pains) have been able to find a case where the point distinctly upon a stated deficiency of assets had occurred till the present case. The priority, Lord Nottingham gave, shows, there must have been a deficiency of assets there. It is quite clear, all the reports of that case are perfectly consistent, that the place of that bond was directly brought to the consideration of the Court.

I am satisfied therefore, the decree must pass for the Plaintiff. Declare the Plaintiff entitled to come in and be considered as a specialty creditor upon the estate of Edward Mayne the elder. Direct an account of what is due upon the bond and of the personal estate; and let the bond be paid in a course of administration (2).

1. SEE, *ante*, the note to *Thomas v. Fraser*, 3 V. 399, as to the cases in which Equity will reform a bond according to the intent of the parties.

2. That in all mercantile transactions respecting their partnership concerns, as far as drawing or accepting bills of exchange, one partner may bind the rest, is well settled: *Ex parte Agace*, 2 Cox, 318; *Ex parte Gardom*, 15 Ves. 267; *Sandilands v. Marsh*, 2 Barn & Ald. 678; *Rapp v. Latham*, 2 Barn & Ald. 801; but the power of one partner, by his deed, to bind another, without the express, or, (as in *Ball v. Dunsterville*, 4 T. R. 314, and in the principal case,) *fairly implied*, assent of that other, has been judicially denied: *Harrison v. Jackson*, 7 T. R. 210; and see the note to *Ex parte Bonbonus*, 8 V. 450. Lord Eldon, however, by his observations in the case of *Hawkshaw v. Parkins*, 2 Swanst. 539, 544, has made it doubtful, whether this doctrine is to be understood as applicable to *all* deeds, or whether it ought not to be confined to deeds of "grant;" his lordship seems to have thought, that a deed of "release" could not come under the same consideration; but it was not necessary, in the case last cited, to determine that point. See, *post*, note 2, to *Dutton v. Morrison*, 17 V. 193.

3. A defective bond, when reformed, has, *from that time*, all the effect of a bond, and though not reformed till after the obligor's death, will bind his heir; but, if before such bond is reformed, judgment should be obtained upon any other bonds, they will be entitled to priority of payment. *Simons v. Urry*, 2 Freem. 6.

(1) Stated 2 Sch. & Lef. 381.

(2) See the note, *ante*, 402.

AMLER v. AMLER.

[1798, JAN. 29.]

MONEY bequeathed to A. to remain at interest or to be by him laid out in real estates to go with other estates devised. A. being tenant in tail of the real estates and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will: the Court inclined in favor of the disposition upon the ground, that A. might have called for the money as absolute owner; but it was established upon the option to continue it personal estate. (a)

JOHN AMLER by his will, dated the 28th of January, 1783, after making a provision for Mary Amler, his wife, devised certain freehold estates, subject to the estate for life before devised to his wife, and other freehold and copyhold estates, subject to the annuities or rent-charges after-mentioned, to his brother Thomas Amler for and during the term of his natural life without impeachment of waste; and from and after his decease the testator devised the same to his nephew John Amler, son of Thomas Amler, and to the heirs of his body lawfully begotten. The testator devised other estates in the county of Salop to his nephew John Amler, to hold the said lands, &c. unto his said nephew John Amler and to his heirs lawfully begotten; and as to certain other estates in the county of Montgomery, subject to the estate for life of his said wife, and after her decease, he devised the same to his said nephew John Amler and his heirs lawfully begotten: Provided always, and he declared his will to be, that if his said nephew John Amler shall happen to die without having any son or sons daughter or daughters at the time * of his decease or born in due time afterwards, then [*584] he gave, devised and bequeathed, all his said freehold and copyhold estates to the first or other son or sons of his brother Thomas Amler by any other wife; the first of such sons and his heirs male lawfully issuing to be preferred and taken before any of the younger; and in case of such male issue failing to his niece Frances Almer and the heirs of her body lawfully issuing; the elder of every son and sons, daughter and daughters, and his, her and their, heirs lawfully begotten being always preferred and to take before any of the younger in succession one after another, as they shall be in seniority of age and priority of birth; and in default of such issue to his own right heirs for ever. The testator after giving divers legacies bequeathed all the residue of his personal estate to his brother Thomas Amler.

By a codicil, dated the 9th of September, 1786, the testator made the following disposition:

“Whereas after my debts legacies and funeral expenses are fully paid and discharged there will remain large sums of money upon different securities of which I give and dispose of some part thereof”

(a) When the Court will impress money with the character of land, see *ante*, note (b) to *Walker v. Denne*, 2 V. 170; note (a) to *Rashleigh v. Master*, 1 V. 201.

in manner following the sum of 2000*l.* which I have placed out on the Pool turnpike security the sum of 1300*l.* lent to Mr. Powys and for which I have the security the sum of 900*l.* advanced to Mr. Jenkins and the sum of 500*l.* advanced to Crump making together the sum of 4700*l.* the interest of which said sum I give and bequeath to my brother the reverend Thomas Amler and after his decease I give and bequeath the said principal sum of 4700*l.* to my nephew John Amler to remain at interest or to be by him laid out in the purchase of estates to go and attend the freehold and inheritance of my estates."

The testator died in December 1786. His nephew John Amler in 1788 married Sarah Lloyd; and by articles previous to the marriage the yearly sum of 400*l.* was provided as a jointure for the said Sarah, charged on part of the real estates devised by John Amler the uncle, part of which lands was the jointure estate of his widow Mary Amler; and after reciting the codicil of the said testator so far as relates to the several sums thereby bequeathed [* 585] amounting to 3400*l.* part of the 4700*l.* viz. the *several sums of 2000*l.* 900*l.* and 500*l.* and that Thomas Amler had agreed to relinquish and give to his said son all his claim to the interest of 3400*l.* part of the 4700*l.* to which he was entitled for life; and that in case John Amler should die in the life of Mary Amler, leaving his intended wife, it might happen, that the rents of the residue of the estates, out of which her jointure was to issue, and not in jointure to Mary Amler, would be deficient to make good the same during the life of the said Mary, Thomas and John Amler covenanted, that they would within twelve months after the marriage assign the said sums of 2000*l.* 900*l.* and 500*l.* to trustees, their executors, &c. upon trust to pay the interest of the said sums of 2000*l.* and 900*l.* to John Amler during the joint lives of John Amler, Mary Amler and Sarah Lloyd; and in case John Amler should die in the life of Mary Amler, leaving the said Sarah surviving, upon trust to pay the same interest, or so much as should be necessary, to Sarah Lloyd during the joint lives of her and Mary Amler, to make up any deficiency in the payment of the said annuity of 400*l.* and after the death of either of them to pay the principal to John Amler if living; but if dead, to his executors or administrators; and upon trust as soon as convenient after the marriage to call up the said sum of 500*l.* and pay the same to John Amler.

Mary Amler died in July 1790. John Amler died on the 1st of December, 1790, leaving Frances Amler his only issue. By his will, dated the day of his death, he bequeathed all that sum of 4700*l.* which had been bequeathed to him by his late uncle after the death of Thomas Amler, in case he the said John Amler had a power of disposing thereof, in manner following: he bequeathed to Samuel Yate, his executors, &c. 1000*l.* part thereof, in trust to pay the interest to his (the testator's) father for his life; and after his decease to pay the interest to his (the testator's) sister Frances Fowler for her sole and separate use; and after her decease to divide

the said 1000*l.* to and equally amongst all her children ; and as to the residue of the said sum of 4700*l.* he bequeathed the same to Samuel Yate, his executors, &c. in trust to pay the interest to his (the testator's) wife for her life ; and from and after her decease to pay the principal to his daughter Frances Amler, her executors or administrators ; and he gave the residue of his personal estate to his wife ; and he appointed her sole executrix.

* Thomas Amler died in 1793 having appointed his [* 586] daughter Frances Fowler his executrix.

The bill was filed on behalf of the infant Frances Amler, claiming as heir of the body of her father against her mother, Sarah Amler, Charles Fowler and Frances, his wife, and their children, and the trustee ; and the bill prayed, that the Defendants may set forth what interests they claim in the said 4700*l.* and that Charles Fowler and Frances, his wife, may call in so much thereof as is outstanding, and pay the whole 4700*l.* into the Bank ; and that the same may be laid out in the purchase of lands of inheritance ; and that such lands may be conveyed to the Plaintiff with such remainders or reversion as to the Court shall seem proper ; or if Frances Fowler shall appear entitled to retain 1000*l.* under the will of John Amler the nephew, that the remainder of the 4700*l.* may be paid into the Bank, and laid out in 3 per cent. Bank Annuities ; and that the dividends may be paid to Sarah Amler for life ; and that at her death the Plaintiff, or whoever else shall be then entitled, may be at liberty to apply. .

Attorney General [Sir John Scott], and Mr. Richards, for the Plaintiff. The question is, whether this sum of 4700*l.* is to be considered as land ; in which case the Plaintiff is tenant in tail, or her father was absolute owner of it ; in which case he has disposed of it by his will. The words " to remain at interest " cannot make any difference. It is to continue at interest as long as may be convenient : but the object was to continue the personal estate as well as the real in the family. He could not mean to give the devisee an option either to call it his own, or not.

LORD CHANCELLOR [LOUGHBOROUGH]. If he had applied for it, should I not have ordered it to be paid to him ?

For the Plaintiff. In *Hector v. —*, before Lord Thurlow, that question was discussed. The money happened to be in Court. A person being thus entitled to the money executed an assignment of it for valuable consideration. After his death the purchaser applied by petition. Lord Thurlow hesitated to deliver out the money. The infant child of him, who would have been tenant in tail of the estates, if purchased, filed a bill ; and Lord Thurlow thought, that *as, if the estates had been purchased, some [* 587] act upon record would have been necessary, he must by analogy, in order to entitle himself, come into this Court and apply for the money. In this case there must have been a fine to bar the issue ; and the limitations in the proviso made a recovery necessary. A person entitled to money clothed with real uses has never

been enabled to dispose of it by will. There is no case, where a party having such an interest in money to be laid out in land, that if so laid out, he may bar it by fine, which is an act in his life, may dispose of it by will, which is not an act in his life.

Mr. *Mansfield* and Mr. *Benyon*, for the Defendants. In *Benson v. Benson*, 1 P. Wms. 131, it was determined, that tenant in tail with reversion to himself in fee of money to be laid out in land may take the money as complete owner (1). Here is an option to let this money remain at interest without any limitation as to the period. *Walker v. Denne*, ante, Vol. II. 170, and *Curling v. May* there cited are upon a question something like this.

LORD CHANCELLOR. I should be glad to see the case before Lord Thurlow; for I always thought it the constant doctrine, that where money is to be laid out in land, the Court will pay out the money upon the application of the tenant for life and tenant in tail, without saying, it shall be laid out in land.

I think he had an option; and there is this farther consideration, that in the circumstances of the family there could have been no use in going through the formality of purchasing an estate, in order to dispose of it.

The sum of 3700*l.* therefore was decreed to be paid into the Bank and laid out in 3 per cent. Bank Annuities; the dividends to be paid to Sarah Amler for life; with liberty to apply at her death.

SEE, ante, the note to *Binford v. Bawden*, 1 V. 512, as to the right of persons who would be entitled to estates tail in lands directed to be purchased with trust moneys, to take the money, without having it invested in land.

[* 588]

WILKINS v. WILLIAMS.

[1798, FEB. 7.]

EXCEPTION to the Master's appointment of a receiver disallowed. (a)

THE bill was filed by a mortgagee for a term of years for 10,915*l.* subject to a former mortgage in fee for 12,000*l.* against Sir Edward Williams, the mortgagor, John M'Namara, Esq., under contract for the purchase and in possession of the estate, and against the representative of the first mortgagee, to redeem the prior mortgage, and that the mortgagor and the Defendant M'Namara might be foreclosed. The bill prayed a receiver; and upon motion it was referred to the Master to appoint a receiver, with the usual directions, and a power to let the

(1) *Short v. Wood*, *Chaplin v. Horner*, 1 P. Wms. 471, 483; *Edwards v. Countess of Warwick*, 2 P. Wms. 173; *Trafford v. Boehm*, 3 Atk. 440; 2 Bro. C. C. 160; *Binford v. Bawden*, ante, vol. i. 512. Contra, *Eyre's Case*, *Onslow's Case*, 3 P. Wms. 13, 14.

(a) See ante, p. 164, note (a) to *Bowersbank v. Colasseau*.

estate with the approbation of the Master; and it was ordered, that the receiver should out of the rents and profits keep down the interest of the mortgages, and pay the balance into the Bank from time to time.

The Master by his report certified, that on the part of the Plaintiff, Henry Allen, Esq. was proposed as a proper person to be the receiver; and that Charles Hassell was proposed on the part of the Defendant M'Namara; and the Master certified, that he approved of the said Henry Allen, and should appoint him receiver. The Defendant M'Namara excepted to the report for these reasons: 1st. That the mortgagor is seised in fee of great part of the estate, and is tenant for life of the remaining part: and the Defendant M'Namara has agreed for the purchase of all his said estate and interest in the premises for 39,000*l.* and two annuities of 500*l.* and 300*l.* to the mortgagor and his wife during their joint lives, and an annuity of 1200*l.* to the wife, in case she should survive her husband; on account of which purchase and annuities 3000*l.* has already been paid; and the mortgagor has signified his consent to the appointment of Charles Hassell:

2dly, The said Hassell is a land surveyor and a person of great skill in the management and improvement of estates: and the Defendant M'Namara agreed for the purchase on his opinion and in prospect of the improvement agreed to be carried into execution by him:

3dly, That the estates are of the annual value of 3308*l.* 7*s.* 1*d.* and are very improvable; and the interest of the mortgages is only 1195*l.* 15*s.*; and the receiver is by the said order directed to apply the rents and profits in discharge of the interest of the mortgages:

4thly, That Henry Allen is proposed by the second *mortgagee, and not approved by the mortgagor or the [* 589] Defendant M'Namara; he being a barrister, and unacquainted with the management and improvement of estates.

Mr. *Hardinge* and Mr. *Sutton*, for the Exception. The general principle upon *Creuze v. Hunter*, 2 Bro. C. C. 253, and the cases, that have followed it (1), is, that where it is a case of competition, the Court will not hear the objection: but a substantial objection may be made. Here there is no personal objection to the receiver. That he is a barrister is determined to be none. The ground is, that the estate being such an ample security to the Plaintiff, and the rents and profits being directed to be applied to discharge the interest, the Plaintiff has no concern in the appointment; and this appointment will have the effect of dispossessing the purchaser; who wishes to be in possession of the estate, for which he has contracted, and of which he considers himself owner; and he is willing to submit to any check as to the application of the rents and profits.

Mr. *Mansfield*, for the Report, was stopped by the Court.

(1) *Ante*, *Bowersbank v. Colasseau*, *Anon.* 164, 515; *Thomas v. Dawkin*, vol. i. 452; *Garland v. Garland*, ii. 138; *post*, *Tharpe v. Tharpe*, xii. 317; *Wynne v. Lord Newborough*, xv. 283; *Attorney General v. Day*, 2 Mad. 246.

LORD CHANCELLOR [LOUGHBOROUGH]. The Master thought, he had no right to object to the receiver of the mortgagee, unless there was a personal objection to the man. It is an indulgence in a mortgagee to suffer the owner of the estate to appoint a receiver: but he is not bound to do it. Over-rule the exception.

THAT a strong ground must be laid to induce the Court to disturb the Master's selection of a receiver; see the note to *Thomas v. Dawkin*, 1 V. 452.

THE SIX CLERKS, *Ex parte*.

The LORD CHANCELLOR and the MASTER of the ROLLS.

[1798, JAN. 22; FEB. 8.]

UNDER the order 18th June, 1668, regulating the office of Six Clerks, they are entitled to receive their proportion of the fee from the sworn clerk; though he has given credit to the client.

THE establishment of the Officers of the Court of Chancery, properly called the Sworn or Sixty Clerks, but commonly called Clerks in Court, appears to have arisen from the necessity, the six Clerks were under, as the business on the Equity side of the Court increased, of taking other clerks to assist them. These as-
[* 590] sistant * clerks it was afterwards found convenient, about the year 1596, to put upon some regular establishment as Officers of the Court; before which time they had not any fixed character. Accordingly in 1596 Sir Thomas Egerton (afterwards Lord Ellesmere) then Lord Keeper of the Great Seal, and the Master of the Rolls, made an order, that each of the Six Clerks should be limited to eight Clerks at the most (which number was afterwards increased, first to nine, and then to ten) to serve under him; and that each of them should take an oath of office: but it does not appear, that any provision was then made as to what fees or portions of the fees payable by the suitors of the Court were to be received by them.

The situation of the Six Clerks and of the Sworn Clerks continued as established by the above order until the eleventh year of the reign of King Charles I.; in which year the Six Clerks obtained letters patent of incorporation with various powers, and particularly with power to divide the suits among themselves according to the letters of the alphabet; but upon the 3d of December, 1637, Sir Dudley Digges, then Master of the Rolls, conceiving the said letters patent to be in the nature of a monopoly, caused a petition to be presented to His Majesty, who then claimed a right of nominating to the offices of the Six Clerks; upon which petition it was referred by his Majesty in council to the Judges for their opinion touching the legality of the

said letters patent ; and after much debate they were waived and not afterwards insisted on during that reign.

By a Parliamentary Ordinance, dated the 25th of August, 1654, entitled, "The jurisdiction of the High Court of Chancery limited, and proceedings there regulated," it was among other things ordained, that from and after the 22d of October, 1654, there should be a certain number of attorneys of the Court of Chancery, not exceeding threescore, who should be nominated by the Master of the Rolls, and being approved by the Lords Commissioners should be by them sworn attorneys in the said Court ; and should receive the 3s. 4d. termly fee, formerly received by the Six Clerks ; and that instead of Six Clerks there should be three Chief Clerks and no more ; and such three Clerks should perform every thing, which the Six Clerks ought to have done, except intermeddling in any cause as attorneys ; and the Chief Clerks were to receive one moiety of the fees for copying ; and for all other matters contained *in the [* 591] table thereunto so much of the fees proportionably as the Six Clerks formerly did and might receive.

This Ordinance was on account of the remonstrances, of the Lords Commissioners of the Great Seal (1) varied by revoking so much as suppressed the six clerks and substituted three chief clerks in their room ; but with that variation it was enforced ; and by another Parliamentary Ordinance in 1656 the Ordinance of 1654 was continued for a year.

On the 4th of March, 1657, the last-mentioned Ordinance being then expired, an order was made by the Lords Commissioners of the Great Seal ; whereby, after reciting, that there had been a doubt since the expiration of the late Ordinance amongst the officers of the Court in relation to what fees should be received in the several offices thereunto belonging, it was ordered, that all things as to the fees should continue as they had been used for the two years last past ; and reciting, that there had been much disturbance and interruption in the proceedings of the Court, by reason of the several claims and pretences of right, as well of those, that were the Six Clerks before the said Ordinance, and who upon the expiration thereof conceived themselves to be remitted into their former places, as also of the sixty lately sworn and admitted attorneys, who conceived themselves still to remain attorneys of the Court, it was also ordered, that the said Sixty Attorneys should have free liberty to proceed and manage the several causes, wherein they were or should be retained or employed : and for that purpose should have free access to the records of the Court and liberty to copy the same for their clients ; and should also receive back from the Seal all such commissions, writs, and process, as they should make and put to seal for their respective clients, they paying for the seals thereof and acknowledging to have received 3s. 4d. as attorney, and to detain or be answerable for the same, as by law it should be determined ; the same having

(1) See the judgment, *post*.

as well before as during the time of the Ordinance of regulation and since been paid by the clients into their hands.

By an order of the Court, dated the 20th of July, 1658, an injunction was granted on the ground of the last preceding order. Disputes however still subsisting, by an order dated the 18th [* 592] of * February, 1658, after taking notice of the order of the 4th of March, 1657, and of the order of injunction thereon, and that there was a Parliament sitting, to which the parties, if they thought fit, might apply, it was declared, that the said orders and injunction be set aside; and that the parties be left to apply to the Parliament, or to take such other course, as they should be advised. Accordingly on the 4th of March, 1667, (before which time an order had been made by Lord Clarendon and the Master of the Rolls, dated the 18th of July, 1666, and then subsisting, though afterwards by a subsequent order discharged, by which the suits were directed to be divided among the Six Clerks according to the letters of the alphabet in the same manner as by the said letters patent of King Charles I.) leave was given by the House of Commons to bring in a bill to regulate the Six Clerks Office; and a bill was brought in, read a second time and committed: but it did not pass the House: the Parliament being soon afterwards prorogued; in consequence of which disputes still subsisted between the Six Clerks and the Sworn Clerks until June 1668; when steps were taken towards a compromise.

By an order, dated the 18th of June, 1668, made by Sir Orlando Bridgman, then Lord Keeper, and Sir Harbottle Grimstone, Master of the Rolls, reciting, that for the better regulating the office of Six Clerks and for settling the differences lately arisen between the Six Clerks and the under clerks of the said office, in such manner as that the inconveniences occasioned by the said differences to the hinderance of the despatch of the business of the Court might be avoided, it was ordained and decreed, that on or before the 1st of November next all the then present under-clerks of the said office, who were then admitted to practice (except such only, against whom there was just cause of exception in the judgment of the Master of the Rolls) should be admitted Clerks of the Court; and that as well they as every other person thereafter to be admitted to the place of an under-clerk in the said office should at or before the time of admission and entrance upon that employment take an oath (to the same effect as that prescribed by the order of 1596); and it was ordered, decreed and ordained, that upon the death or removal of any of the said under-clerks, so to be admitted and sworn in each Six Clerk's division, no other person should be admitted to practise in the place or places of him or them so dying or removed, until the number should be reduced to ten under-clerks in each respective Six Clerk's division; that so the number of under-clerks might be reduced to sixty; at which number the under-clerks should be continued, unless the Court should find it necessary to increase or abridge the same; and that when any vacancy

should happen after such reducements, none should be nominated by the Six Clerks respectively, unless he and they had been educated in the Office, and had served seven years at least as a clerk under some of the Six Clerks or under-clerks, and should be of honest and civil behavior, and otherwise fitly qualified; and that no person upon any pretence whatsoever should be permitted to practise as under-clerk but only such as should be sworn and admitted as aforesaid; and that no under-clerk so to be sworn and admitted should at any time or on any pretence whatsoever be deprived, suspended, or in anywise hindered from the exercise of his employment but by judgment or order of the Lord Chancellor, Lord Keeper, or Master of the Rolls, for the time being only; and that out of the fees payable by the clients the said under-clerks respectively, to be sworn and admitted as aforesaid, should receive, retain and keep, to their own use respectively, the several fees and allowances thereafter mentioned; and should be accountable to the Six Clerks respectively for any business to be despatched in said office after the rates and proportions only thereafter set down, and not otherwise; among which fees to be accounted to the Six Clerks was 4*d.* per sheet of all copies of bills, answers, pleas, demurrers, depositions, and other records; and it was farther ordered, ordained, and decreed, that if any of the said under-clerks for the time being after his or their receipt of any of the fees and sums of money aforesaid or after his or their delivery out to his clients or any on his behalf any writs, commissions, exemplifications, or other process, or of any copies of any bills, answers, or other pleadings, made, written or despatched in the said office, should not duly account for and pay what belonged to every Six Clerk, to whom he was accountable, and ought to pay the same, according to the rates and proportions aforesaid without any wilful delay or concealment, every under-clerk so offending upon complaint and proof thereof made before the Lord Chancellor, Lord Keeper, or Master of the Rolls, should, over and besides such remedy as the Six Clerks have legally for the same, undergo such punishment, as the said Lord Chancellor, &c. for the time being should judge meet.

* And it was therefore also ordained and decreed, that [* 594] no commission, writ or process, nor any copies of any records, should be delivered out of the said office to any client, until first signed by the Six Clerk, to whom the same did properly belong, or his deputy, or in their absence by some other of the Six Clerks not towards the cause; and that all commissions, whereby any depositions were taken and returned, which belonged to the Six Clerks to receive, should be delivered to the Six Clerk, to whom the same did properly belong, or his deputy, to be safely kept, and not to be kept back or broken open by any of the under-clerks or other person till publication should be passed; for which purpose each Six Clerk was thereby enjoined to have one or more deputy or deputies to be constantly attendant in his said office in the absence of the said Six Clerk, for signing writs, copies, and receiving commissions.

And it was also ordered and decreed, that all bills, answers, and other proceedings, relating to any cause commenced in that Court since the 1st day of Michaelmas Term then last, and then remaining unfiled, should be filed with such Six Clerk, to whom the same should properly belong; and that the under-clerks respectively according to the proportions beforementioned should duly satisfy and pay the Six Clerks respectively the fees due for the same as aforesaid, in case such under-clerks respectively had received all the fees for the same of their clients respectively; and if not, then they should give unto the Six Clerks respectively a note in writing under their hands of the name or names, place or places of abode, of such client or clients, who were in arrear for any fees due to them, and the *quantum* of such fees; to the end the Six Clerks respectively might take such course for the recovery thereof, as they should be advised; and that for so much of such fees the said under-clerks should be discharged and acquitted for every farther demand from them concerning the same.

On the 20th of March, 1688, another order was made respecting the admission of the Sworn Clerks, and prohibiting any other person than the Six Clerks and sworn under-clerks and their clerks or servants from doing business in the office or having access to the Records.

On the 13th of February, 1706, the resolution of a Committee of the House of Commons, to whom a petition of the Six [* 595] Clerks *styling themselves the present Attorneys of the Court, and stating that the Sworn Clerks had encroached upon their fees, had been referred, that the Six Clerks had not made good their allegations, was agreed to by the House; and the petition was dismissed.

By the statute 4 & 5 Ann. c. 16, it was enacted, that no copy, abstract or tenor, of any Bill in Equity should go with the *Dedimus* or Commissions for taking any Defendant's answer; but in lieu thereof the Sworn Clerks should take to their own use in all causes the whole term fees of 3*s.* 4*d.* and the whole fee or fees for all small writs made by the said Sworn Clerks.

On the 2d of September, 1734, a Commission issued by order of the late King under the Great Seal, in consequence of an address of Parliament to inquire into the fees and duties of various Offices of Law and Equity; which Commission was returned on the 11th of November, 1734: and the Inquest found as to the Office of the Six Clerks the several particulars before stated, and the fees and duties of the Six Clerks and the Sworn Clerks; and particularly, that the Six Clerks were to be daily attendant in their respective offices in person or by deputy; and that the Sworn Clerks were to attend the hearing of all causes, wherein they were concerned; and that they were the attorneys on the Equity side, and had a right to act as Solicitors of the Court.

On the 2d of May, 1785, the Six Clerks executed articles, by which it was agreed, that from the 1st day of Michaelmas Term

next they would execute such part of the business of the Office, as it should be their duty to transact, in one common room in the Six Clerks' Office; and for the more regular and effectual despatch of the business one or more of the Six Clerks, as the business should require, should daily attend in such manner as should from time to time be agreed by them or the major part of them by writing under their hands; and that every or any Six Clerk so attending should not only enter and sign all such Bills, Answers, Replications, Proceedings, &c., as should belong to the execution of the business in his own particular division, but likewise such as should belong to the divisions of the other Six Clerks, who should be absent; distinguishing, in whose division the same should be filed; and that all the profits and emoluments of the several divisions in the * Office, except the fees and profits in respect of the of- [* 596] fices of Riding Clerk and Comptroller of the Hanaper, should be equally divided among them; and that they would not compound or give credit to any person for any fees or moneys, which should become payable to them or any of them in respect of the several divisions of the said office; but that the Six Clerk attending should from time to time take all the fees and profits of all the six divisions, as they should become due, by his own hands, or the hands of such person, as he should from time to time appoint to receive the same.

By an order, dated the 29th of July, 1785, made by the Master of the Rolls, the said agreement was approved, and ordered to be carried into execution.

The Six Clerks proceeding to act under this agreement and order would not accept the composition for their proportion of the fees, which they had usually taken by agreement with the Sworn Clerks; and they refused to file the records, until they were paid their proportion of all the fees due to them, though such fees had not been received by the Sworn Clerks, and though the usual compositions were tendered; and Mr. Sewell, one of the Six Clerks, brought an action in the Petty Bag Office against Mr. Barker, one of the Sworn Clerks in his division, for the amount of his fees; which was tried at Guildhall before Mr. Justice Buller on the 7th of July, 1787; and a verdict was found for the Plaintiff under the direction of the Judge.

In Michaelmas Term 1787 Mr. Hill, another of the Sworn Clerks in Mr. Sewell's division, filed a bill, praying a discovery of several matters charged by the bill, and that the compositions payable by the Plaintiff might be established and declared to remain undetermined; that the agreement between the Defendants, the Six Clerks, might be set aside; with consequential directions, that they might perform the business in their respective divisions only and by separate deputies, &c.; and that they might be directed to file the Records, &c. without delay; that the Plaintiff might have satisfaction for the loss he had sustained by their delays, and an allowance for his trouble in advising his clients in such matters of

practice, as the Defendants had neglected to do; that the Defendants might be restrained by injunction from proceeding at law; that they might account with the Plaintiff, and deduct for all fees received from his clients; and that it might be determined by the Court what fees or compositions were due from him, and to whom, and when payable.

To this bill the Defendants put in a demurrer and an answer. On the 3d of July, 1788, the demurrer was argued before the Lord Chancellor, and allowed. The Defendants obtained an order for dissolving the injunction, unless cause. The Plaintiff showed exceptions for cause; and the Master having reported the answer sufficient, the Plaintiff took exceptions to the report. The exceptions were argued before the Lord Chancellor on the 16th of January, 1789: when his Lordship considering, that the exceptions applied to the same matters, to which the demurrer related, disallowed the exceptions; and the injunction thereupon became of course dissolved. The Plaintiff appealed to the House of Lords from the orders of the 3d of July, 1788, and the 16th of January, 1789; and both the said orders were affirmed.

In Hilary Term 1797 Mr. Sewell commenced an action upon the law side of the Court against Mr. Hill for the recovery of fees alleged to be due. On the last day of Hilary Term Mr. Hill moved for an injunction. The Lord Chancellor made no order; but declared, that the Plaintiff in the action should apply to the Master of the Rolls for recovery of the said fees in a summary way; upon which the petition was presented.

The Master of the Rolls desiring, that the petition should be set down before the Lord Chancellor, it was accordingly argued at Lincoln's-Inn-Hall upon the 22d day of January, by the Solicitor General and Mr. Campell, in support of the petition, and Mr. Mansfield and Mr. Stratford against it.

Feb. 8th. LORD CHANCELLOR [LOUGHBOROUGH]. It is not for us to enter into so ample a field, as is now (1) suggested. We are not sitting now to form a regulation. We are not inquiring, *quid optimum*; but *quid statutum*. Our only business is to give an exposition to an order of the Court. Whether that or any other [*598] order is liable to be *examined upon the prudence or amplitude of it may be a question; but we are called upon to declare, what right is given by the order of 1668 to the Six Clerks. It was put upon that ground by the Sixty Clerks; and I am very happy to find, that it is expected, the exposition should come from the Court.

Though in a question between officer and officer it is not fit, that it should come to be an inquiry any where else than in the Court (2), nor in any other shape than as a question before a domestic tribunal,

(1) Mr. Barker had addressed the Court on behalf of the Sworn Clerks; and was answered by Mr. Sewell.

(2) *Barker v. Dacie*, post, vol. vi. 681: Demurrer to a bill by a Clerk in Court against a solicitor for the amount of the Plaintiff's bill of fees, &c. over-ruled.

I do not hesitate to declare *in limine*, that I do not differ from the exposition given to the order in the Courts of law ; but I should not feel myself bound by those decisions as positive authorities ; as it could not be discussed so fully nor with so much advantage of information as in this Court.

The order was made to reconcile differences, that had for a long time subsisted between the Six Clerks and the Sixty Clerks, and to frame a regulation prospective as to their respective rights ; and as to the immediate cause of dispute, that forced itself upon the notice of the Court, to provide justly upon the rights of the parties with regard to the past. In that respect it is retrospective. The retrospect is not very long. To understand the scope and effect of that order I have examined with some attention : I do not know, that I have seen all upon the subject : but I think, I have seen enough to satisfy my own mind, that the opinion, I am about to state, is well founded.

As to the history of the Court I am much indebted to the case, that Mr. Hill prepared for the House of Lords. The Six Clerks appear to have been from the highest (1) antiquity the sworn officers of the Great Seal and likewise of the Court of Chancery. They were with regard to the other clerks, that came afterwards, the only officers upon the establishment of the Court. That is perfectly clear from the course of the orders made by Lord Ellesmere, and more so from those by Lord Coventry. I believe, it is correctly stated by Mr. Hill and Mr. Barker, that the business of the Court began to extend beyond the ordinary jurisdiction in the reign of Queen Elizabeth : I rather take it a little earlier, from the time of Sir Thomas More. When the business increased, it naturally happened, that recourse was to be had to those officers and to those *forms, that were established ; and of necessity it [*599] came about, that the Six Clerks from the nature of their office were the attorneys of the parties, charged with their business (2). As the business increased, they could not manage it themselves : they were obliged to get a number of persons to assist them. That number was optional ; and the service voluntary. In process of time it was limited. The Court then came to take notice of them, limited the number ; and younger clerks were taken in ultra the number. This was the condition of the office during the reigns of Elizabeth and James, and down to the time of Lord Coventry. I have no doubt in the course of 50, 60, or 70, years, the burthen increasing, and being managed by the Six Clerks, the only sworn officers, it is most likely in conjecture, that, the persons employed under them exercising great attention, and their offices being very lucrative, they would relax a little of their attendance, and repose much upon those employed under them. It is quite certain, that the Office of Six Clerk became very valuable in Lord Coventry's

(1) Their number was settled by an Ordinance made for the regulation of the Court in the 12th year of King Richard II ; in whose reign the writ of *Subpana* originated.

(2) *Post*, vol. xiii. 197.

time. It appears from a whimsical anecdote in Lord Clarendon's history. When Sir Julius Cæsar was Master of the Rolls, a Six Clerk was forced upon him; who had destined that office as a provision for a son. The price given (they were very improperly sold then) was 6000*l.*: a monstrous sum at that time. It was therefore very valuable, and probably an office of very considerable ease at the same time. The Clerks in Court, as they are now called, the under-clerks, as they were always called at that period, having by degrees the real and effective management of the business, and no fees being established to them *qua* such, all being paid to the Six Clerks, the profits of the under-clerks increasing necessarily, and very properly, they desired to acquire a permanent establishment. I will state the progress of that. In 1653 a proposition was made by what was called the Parliament, which would have been the complete destruction of the Courts both of Law and Equity of this country. It was a vague, wild, and absurd, proposition of reform. Some of the great men tried to stem the torrent, not with much effect at that time: but luckily that Parliament dissolved itself. Some of these ideas of reform had taken strong hold of the minds of some persons, and produced the Ordinance by Cromwell to regulate the Court of Chancery. It contains three articles: First, that instead of the Six Clerks and the under-clerks, out of the number of these in the habit of practising a certain number to the amount of sixty should

[*600] be nominated by the *Master of the Rolls, and being approved by the Commissioners of the Great Seal should be admitted attorneys of the Court. The next article is, that the Six Clerks should be abolished, and three Chief Clerks appointed to have the superintendence of the attorneys so sworn and admitted, who were to manage the causes. The third article respects the filing of the proceedings, and the distribution of the fees. Some of the regulations are very impracticable, some absurd, some not unuseful. When this ordinance was published, it was intimated to the Commissioners of the Great Seal; who were Whitelock, Widdrington, and Lenthall, the Master of the Rolls. They resisted it; and took exceptions. The first exception was to the three first articles; and they state, that they are called upon against their consciences to deprive persons of their freehold against *Magna Charta* and the laws of the country, and desire to have the advice of the Judges. The effect of their exception was, that as to the first three articles, to which they took that broad ground, that it was to deprive men of their freehold, &c. the Council proceeded upon that; and they immediately departed from it, and proceeded to the nomination of Six Clerks. With that alteration only they directed a letter to the Commissioners of the Great Seal, requiring them to execute and pay obedience to the order. The result was, that two of them, Whitelock and Widdrington, resigned the office, refusing to execute it as contrary to their duty and conscience. Whitelock's Memorial has the whole account of it. Lenthall, who had been the most violent upon it, kept his seat, and submitted. The next Parliament gave a

temporary confirmation to this ordinance. It continued for a year; and then expired by time. Then the dissensions began again. The Six Clerks insisted (for they had not been suppressed) that they had the sole care of filing the records and managing the process; and that the attorneys put in were under-clerks; and they would not permit them to have access to the office. This produced the order of March 1657 by the then Lords Commissioners, reciting the controversy between the Six Clerks and those, who had been lately sworn in and admitted attorneys. The order was provisional; that they should continue to act, as they had done, until some regulation should be made by Parliament. Immediately upon this order, it appears, the Six Clerks had insisted upon their right at law, and refused to comply with the order; which produced an injunction founded upon that order, and stopping them at law. In 1658-9 that commission * of the Great Seal was altered, [*601] and Whitelock was restored; and in the next month, about three weeks afterwards, he taking the lead, and Lenthall submitting, that Order was set aside, and the injunction founded upon it was dissolved, with this sort of preface; that the Parliament was then sitting, and the matter might be subject to a parliamentary regulation. That left the thing with all the contention likely to arise. That Parliament, which did not sit long, had other things to think of.

Thus it rested till the Restoration: then a very considerable change took place. By the Orders of Lord Clarendon and Sir Harbottle Grimstone it is very clear, they had taken up the case of the Six Clerks with great zeal, perhaps rashly. They reduced the Sixty Clerks to be considered only as under-clerks to them. In the course of Lord Clarendon's Orders you will find the Court in the first Orders that were made, going out of their way to mark the re-establishment of the Six Clerks to the situation, they were in in Lord Coventry's time, and the depression of the Sixty Clerks; declaring, that the Six Clerks, who are the proper and only Officers of the Court, are to manage the business, and to inform themselves of their clients' causes, and give an account thereof to the Court, as attorneys in all other Courts do, and not leave the care and knowledge thereof upon their under-clerks. The business was put directly in the same way, as it was in the time of Lord Coventry. The Six Clerks were to carry on the whole business. That was not adapted to the business of the Court at that time. It could not rest here. The bias had gone too much in favor of the Six Clerks. The struggle tended to perplex all parties acting in the Court. The Six Clerks must have found it impossible to manage the whole business, to be the attorneys of the Court. It became perfectly necessary to make another regulation. We see in the order of 1668 the confused state of the business: in some parts of the office the records were filed and arranged: in others they were not: the Six Clerks not letting the others into the office; and the confidence of the

clients being in the under-clerks. Both parties became tired of the contest ; and the order of 1668 was made to settle it.

The first point to be settled was the constitution of the Sixty Clerks ; and the character they should bear. Therefore to give a permanent establishment to the Sixty Clerks they were to [* 602] have *an establishment of their own. An arrangement of the fees was necessary. The Six Clerks gave up a part ; and the fees were made payable to the Sixty Clerk ; out of which an *aliquot* part was to be given by him to the Six Clerk. Without doubt anciently they were to be paid to the Six Clerks ; out of which they were to pay the Sixty Clerks. Having settled the proportion of the fees, the order provides for the payment of the fees ; and it was directed, that the Six Clerk shall receive from the under-clerk his fee under two terms : first, upon the receipt of the money : secondly, upon the delivery of the copy of the bill or other article (1). These are perfectly adapted to perfectly distinct circumstances, into which the case might naturally fall. When a copy is bespoke, the fee ought to be deposited. It is so at law, we know. If the fee is received therefore, as soon as received, the proportion was to be paid over to the Six Clerk. But it was in the judgment of the Sixty Clerk, who managed the business and knew the client, whether he would require the fee to be deposited, or not. He could enforce payment by not giving out the copy. The regulation therefore was attended according to the practice at that time with no injury to the Sixty Clerks ; and I have no doubt, they were perfectly well satisfied. It is quite impossible, that any order can be an order to give credit. The person to receive must have a right to receive. Credit depends upon judgment, confidence and discretion. It would be very useful for the public, that little credit should be given upon articles of law. The Six Clerks had no communication with the clients. They could not have the opportunity of judging. If the Sixty Clerk gave credit he might say to his client, "I must stand in your place with the Six Clerk."

As to the second part of the order, it is very strange, that it should be thought enough to tell the Six Clerk, who the client was. The fee is one entire fee. With regard to the confusion of the last year preceding the date of the Order, it was necessary to make some provision retrospective. It was confined to that period. During that period the Six Clerks were entitled to the fees. They had consented to an abatement of their fees in future : and accordingly the Order fixes that for the future : but this consent is not retro-active. He was entitled to the full fee for that period. Therefore the regulation was, if the Sixty Clerk has received the fee from the client, [* 603] let him pay it over to the Six * Clerk : if not, let him

(1) The office copy, made by the sworn clerk, who certifies on the back, that it has been examined, is signed by the Six Clerk in the margin at the head of the first folio : that signature authenticating it as the copy of the original, filed ; and marking the number of folios ; but not warranting the accuracy of the copy ; for which the Six Clerks are not responsible : *Browne v. Barnard*, 1 Jac. 57.

give a note of the person, who is debtor, not to him, but to the Six Clerk, that he may take such measures, as he thinks fit. But that does not at all regard the prospective regulation. I dare say, it has, and will again happen, when this subsides, that the business will be carried on with great confidence. It is impossible to say, the Six Clerk shall be obliged to take his chance of the solvency of the person. The more the actual business of the Court is done in ready money, the more beneficial it will be to all parties. As to what cannot be so done, it will regulate itself. The situation of the Six Clerks, the course of the business, does not perhaps enable them to take a strict, accurate account. The explanation of the rule must be upon this order.

The order must be made pursuant to the prayer of the petition.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. In consequence of what fell from the Lord Chancellor these two petitions were presented to me. It was natural for me to wish, they should be set down before his Lordship. I have only to return my thanks for the manner, in which he has acceded to my request, and to declare my entire concurrence.

As to the antiquity of the office of Six Clerks; see *Barker v. Ducie*, 6 Ves. 687; and as to the responsibility of those officers see *Broune v. Ballard*, Jacob's Rep. 57.

PARKINSON v. INGRAM.

[1797, BEFORE THE LORD CHANCELLOR, [LOUGHBOROUGH], DEC. 9, 10.—
BEFORE HIS LORDSHIP AND THE MASTER OF THE ROLLS, [ARDEN],
1797, DEC. 16; 1798, FEB. 8.]

AFTER a decree the Master may examine witnesses; (a) but ought not to do so by his clerk: the same *subpœna* issues as to bring them before the Examiner; which is the same as a *subpœna* to answer: but the label expresses the purpose: upon an examination in the country the body of the writ expresses, that it is to testify.

The decrees in the Exchequer always express, that the officer is to be armed with a commission to examine witnesses and power to direct the same to the country; so formerly in Chancery, [p. 607.]

After a decree, if the Master sees cause for a commission to examine witnesses in the country, he certifies, that it is necessary; and the depositions, when returned, are filed by the Six Clerks: but depositions taken before the Masters are kept in their offices, [p. 608.]

THE *Solicitor General* [Sir John Mitford], moved, that Mr. Manley should be committed for a contempt of the Court in not submitting to be examined before the Master.

By the decree made in this cause it was referred to the Master to

(a) As to the evidence before the Master; see 1 Barbour, Ch. Pr. 493-503; and particularly as to the examination of witnesses. Ibid, 497-502; *Mitford v. Peters*, 8 Sim. 630; *Smith v. Graham*, 2 Swanst. 264; *Rowley v. Adams*, 1 My. & K. 543. See, ante, note (a) to *Sandford v. Paul*, 1 V. 398.

take an account, with the usual directions. The Master desiring to examine Mr. Manley, who was not a party in the cause, as a witness, it was objected, that the examination of witnesses after as well as before a decree ought to be before the Examiner; the Master having no such power. The objection was taken upon an order made by Lord Clarendon on the 27th of February, 1667; reciting, that the

Masters for the ease of the Court upon references to them [*604] have of late been armed with commissions to *examine witnesses and power to direct commissioners to the country; and that such examinations are in danger of being lost; and it is not known, where they are to be found upon the death of the Master; and directing, that for the future no witness shall be examined before the Master after a decree.

The object of the motion was only to have the opinion of the Court, whether the examination should be before the Master or the Examiner.

Solicitor General, Mr. Richards, and Fonblanque, in support of the Motion. According to the constant practice the examination of witnesses after the decree is before the Master; who never settles the interrogatories for an examination before the Examiner but by special order, in consequence of leading interrogatories having been before prepared, or as to some matter, that has been examined to previous to the hearing. The examination by the Master's clerk is certainly an abuse. Where it is not in town, the Master cannot issue a commission: but he certifies, that a commission is necessary: then an application is made to the Court; and it is issued by the Six Clerks, returned to them, and copied and filed. If the practice was not considered very clear, this objection would have been often made. There can be no check before the Examiner as to matter impertinent to that, upon which the Master wishes to be satisfied. Besides, how is the Examiner to know, at what time to publish the examination? There is no rule to publish after the hearing. There must have been some subsequent order different from that of Lord Clarendon. By an Order made the 23d of June, 4 James II. it is ordered, that for the future no Master in Chancery shall receive the deposition of any witness ready drawn; and no clerk of a Master shall presume to examine any witness in any cause depending before any Master: but every Master himself shall examine all witnesses to every *item* of any interrogatory to be taken before him. In the Table of Fees allowed by Lord Hardwicke there is a fee for Office copies upon examinations before the Master: but in a very old Table of Fees there is no such charge. The Examiner made an attempt before Lord Thurlow to revive Lord Clarendon's order: and failed.

Attorney General [Sir John Scott], Mr. Lloyd, and Mr. Trower, *contra*. Where there is a consent to take the examination before the Master, that *cures the objection, and gives the Master jurisdiction: but where that is not the case, the regular course is, that the Master is to settle interrogatories, and the parties are to go before the Examiner. If it is in the

country, the depositions taken are sent up to and filed by the Six Clerks; where they are upon record, if an indictment for perjury is necessary. It is impossible to support an indictment for perjury upon a deposition before the Master. The Master may direct such points, as he wishes, to be examined to; but does not settle interrogatories as to a witness; as he does, where a party is examined upon interrogatories. How can an unwilling witness be brought before the Master? There is a *subpœna* to bring him before the Examiner. Is there any right to bring a stranger before the Master? What is the Master's warrant to him? There is no instance of a *subpœna* for that purpose. How are you to bring him into contempt? Several of the Masters conceive, they have no power to examine.

LORD CHANCELLOR [LOUGHBOROUGH]. I am surprised, that this is a matter of doubt. The only object of my attention first was to find out, if there was a settled practice. If there was, I should have adhered to it, and endeavored to make some sort of regulation and reform; which, Mr. Dickins informs me, Lord Thurlow intended, being dissatisfied with the conduct of the Examiners: but he made no order, and gave no opinion. I should not wish to disturb the practice, as it prevails: which I understand to be that the examination shall be before the Master; but if I was to decide it, there is no doubt, the examination should be before the Master in all cases, where the examination is to be in town, as to all matters, that are to be examined in the Master's office. Where they are in town, and the examination is to be for the information of the Master, it is absurd to turn them over to the Examiner. Upon my own observation the depositions are abominably taken in the Examiner's Office. I have again and again observed it. I spoke to the Master of the Rolls upon it. The mode of taking depositions there tends to perplex the evidence, and creates great expense, making the witness negative one after the other all the circumstances of the interrogatory, of which he knows nothing.

From the order in the reign of King James it is manifest, that it was then the practice for the Master to examine. It proceeds clearly upon the supposition, that it was then the course of the *Court for the Master to examine upon matters de- [*606] pending in his office. Upon all the recollection, I have, upon special matters to be examined before the Master, not only the parties, but the witnesses, are to be examined by the Master. It is very competent to the Master from the respect due to him: but it is very irregular to leave it to the clerk, and perfectly contrary to that order in the reign of King James II; which cannot leave a doubt as to the practice then; for that was to regulate it. The principal object of Lord Clarendon's order seems to have been to settle the question between the Masters and the Six Clerks; which I take to have been the principal dispute at that time. The other part was but incidental. As to the objection, if the witness refuses to attend, as in all cases, where witnesses refuse to attend or to answer, or

misbehave themselves, the authority of the Court must interpose. As to the indictment for perjury, sure the Master has authority to administer an oath.

I will direct an inquiry to be made of the Masters generally. I believe, great inconvenience will arise in many cases, if the Master may not exercise the authority of examining. He is frequently much more proper: particularly in matters of account before him. He is much more acquainted with the cause. The examination will be much shorter and more pointed. How little does he go towards the examination merely by settling the interrogatories, if he does not know what answer is made!

Feb. 8th. Lord CHANCELLOR. I find by every person, I have talked to on this subject, it is quite settled, that the Master, whenever any subject occurs, in which he wishes to have the examination of a witness, takes the examination of the witness; and that there is a *subpœna*.

MASTER OF THE ROLLS, [Sir RICHARD PEPPER ARDEN]. From the consequence of this motion I have taken all the pains, I could, to trace the practice of the Court as to the examination of witnesses after a decree.

When the office of Examiner became first established, is not quite clear: but as to examinations before a decree there must have been either sworn officers of the Court, whose duty it was to examine, or there must have been a special authority either to the Master or some other person to examine. It was not incident to the [*607] *Master's duty to examine previously to a decree. The office of Examiner is very ancient; and undoubtedly they are the persons, who ought to examine all witnesses except such in the country, whom the Court gives an express authority to examine. The Masters have been in the habit of examining after a decree: but there was an express authority by the decree, I apprehend, that the Master was to be armed with a Commission to examine witnesses, and to direct the same into the country, if he thinks fit; and it was not of course; but regularly the Examiner was to examine such witnesses as the Master thought necessary; unless the Master certified, that a Commission was necessary. Lord Clarendon thinking this an improper insertion in the decree made the Order of the 27th February, 1767; the recital of which certainly shows, that a preference ought to be given to the Examiner on account of the regular mode of preserving the examinations. Notwithstanding that Order it appears, by the Order in the time of King James, they had begun again to examine in the Master's office. It arose from the Court's not continuing to observe that Order. I have found three decrees in the time of King James II. in which that direction, that the Master is to be armed with a Commission to examine, &c. is inserted. I believe, it was always inserted, if desired; as it constantly is in the Court of Exchequer. Mr. Dickins has furnished me with a decree in the reign of King William III. in which the only difference is, that the Master is to be at liberty to examine witnesses. No other

decrees are to be found : but the constant practice is for the Masters to examine, where they see fit, and if they see cause to direct a commission to the country, they do not direct it ; but they certify, that it is necessary (1). Then arose the dispute, whether these depositions taken in the country should go into the Master's Office, or be filed in the Six Clerks' Office ; and it was determined by the Court, and the constant practice is, that they shall be kept in the latter. As to the depositions taken before the Masters in their Office, their habit is to keep them there.

The question is, whether this constant practice is not sufficient evidence, that the Court did give them authority : I should be sorry to say, that against a strict Order it was done by the Masters without ever receiving the approbation or sanction of the Court. I have looked into the book, which Mr. Deaves had made of such points of practice with regard to petitions and motions, as he *thought worth the consideration of the Court and worthy [* 608] of being preserved. It contains innumerable orders for the suppression of deposition of witnesses before the Master, for the examination of Defendants to be examined before the Master, for the examination of witnesses after the examinations have been seen. In *Shepherd v. Collyer* (2) in 1744 (after Mr. Deaves himself became an officer) the Master of the Rolls denied a petition for the purpose last-mentioned ; and it is stated, that though in depositions taken before the Master no publication passes, the Court ought to be cautious, how they permit one party to go into evidence, after they have seen the depositions ; but it was afterwards ordered by the Lord Chancellor, as to what is specified in the order, on account of the nature of the evidence, being merely a fact. It is too much therefore to infer, that the Court has not sanctioned it ; and the Masters must be supposed armed with this power. Therefore I concur with the Lord Chancellor, that the Master, if he thinks fit, may examine witnesses after a decree. At the same time the practice to examine before the Master's clerk can never be proper.

It has been said, that no subpoena ever issued for an examination before the Master : but that is a mistake. It is by the same subpoena as to come before the examiner : but it is oddly expressed. It is not to appear before the Master or the Examiner ; but is the same as the subpoena to answer a bill : commanding the witness personally to be and appear in Chancery to answer concerning those things, which shall be then and there objected to him, and do further and receive what the Court shall have considered in that behalf : but the label explains what is the purpose.

Considerable doubt having been expressed at the bar, as to this

(1) *Sandford v. Biddulph*, *post*, vol. ix. 36.

(2) See *post*, vol. xix. 594 ; *Coop*. 293 ; *Willan v. Willan* ; where this case is stated by the Lord Chancellor from the Register's Book ; and it appears, *post*, xix. 591, n. that notwithstanding this decision in *Parkinson v. Ingram*, the practice of examining before the Examiner after a decree continues.

subpœna, the Lord Chancellor a few days afterwards said, he had sent to the Subpœna Office; and there is no other subpœna than that stated by the Master of the Rolls; the label giving notice, that it is to testify, where the examination is in town: but where it is in the country, the body of the subpœna expresses, that it is to give testimony.

Upon this decision Mr. Manley went before the Master.

1. WHENEVER the Master certifies, that a commission for examination of witnesses is necessary, such commission issues of course. *Sandford v. Biddulph*, 9 Ves. 36; *Bearcroft v. Berkeley*, 2 Cox, 109. But the Master cannot, under a decree directing inquiries, examine a witness who has been examined in chief, without leave of the Court. *Smith v. Graham*, 2 Swanst. 264; *Willan v. Willan*, Coop. 292; *S. C.* 19 Ves. 592; *Purcell v. M'Namara*, 17 Ves. 435. Still, though witnesses examined in the cause cannot, without leave specially given, be re-examined before the master, even on substantially different interrogatories, (*Greenaway v. Adams*, 13 Ves. 360; *Sawyer v. Bowyer*, 1 Brown, 388), the Master, when making the inquiries, or taking the accounts, directed by the decree, may examine other persons, without a special order from the Court, and receive in evidence any depositions from such fresh witnesses as bear upon the question in issue; the Master may also receive evidence which, as being on the record, was, in a certain sense, before the Court in the cause, though it was not actually read at the hearing. *Smith v. Althus*, 11 Ves. 564.

2. As to the general rule, that interrogatories for a second examination of the same witnesses must be settled by the Master; see, *ante*, note 3 to *Sandford v. Paul*, 1 V. 398.

3. Although a Master has once closed his examination, it is in his discretion to receive farther interrogatories. *Price v. Lytton*, 5 Mad. 465; *Lynn v. Buck*, 3 Mad. 282, unless the depositions first taken have been published; *Willan v. Willan*, 19 Ves. 592. Or (as it is proposed by the bill now before Parliament for regulating the practice in Chancery,) unless he has issued the usual warrant on preparing his report. The same bill proposes that Masters in Chancery should be armed with the power of examining *viva voce*.

4. As to the effect of continued practice, even when in contradiction to a positive order; see *Boehm v. De Tastet*, 1 V. & B. 327; *Broomhead v. Smith*, 8 Ves. 363; *The Queen v. The Bailiffs of Beesley*, 1 P. Wms. 223; ——— v. *Challen-der*, Hardr. 98; *The King v. Man*, 2 Str. 755.

[* 609]

MATCHWICK v. COCK.

[ROLLS.—1798, FEB. 19.]

TESTATOR directed his children generally to be maintained during the life of his wife, but distributed his property after her death in words, which would not comprise after-born sons: they were held entitled to the former provision. (a)

JAMES MATCHWICK by his will, dated the 9th of March, 1791, after certain legacies, gave, devised, and bequeathed, to John Cock and two other persons, their heirs, executors and administrators, all

(a) A Court of Equity is always anxious, under the word children, to include all children in existence at the time of the death of the testator. *Ringrove v. Bramham*, 2 Cox, 384; and particularly when he stands in the relation of parent to the legatees, the Court, presuming that he intended to do his duty in providing for all

his freehold, copyhold and leasehold, messuages or tenements, farms, lands, hereditaments, and premises, and all his household goods, household stuff, furniture, ready money, money in the funds, securities for money, and all other his personal estate, upon trust, that they should receive the rents, interest, dividends, proceeds and profits, of his real and personal estate, and from time to time and at all times pay, apply and dispose of, such rents, interest, &c. as might arise from such parts of his real and personal estates as might remain after payment of his legacies and of his debts and funeral expenses, and the expense of proving his will, (which he willed should be paid out of his personal estate) in manner following: then after giving a specific legacy of stock to the separate use of his sister Mary Taylor for life, and after her decease to her son James Taylor, his executors, &c. to be transferred to him at twenty-one, as to the rents of his said real estates, and the interest, dividends, proceeds and profits, of the remainder of his said personal estate, in trust to pay, apply and dispose of, the same unto and for the maintenance of his beloved wife Ann, and the maintenance and education and bringing up of his children, in such manner, parts and proportions as his said trustees shall think most eligible and beneficial, until the decease of his said wife. The testator then directed his trustees with all convenient speed to sell a particular estate, and to invest the produce of the sale in the public funds and the dividends or interest thereof from time to time to pay, apply and dispose of, in the manner and for the purposes last before mentioned; and he empowered his trustees to sell out or dispose of any reasonable parts, as to them should seem eligible and proper, of his said moneys in the public funds, as a premium to place out his son Thomas Matchwick as a clerk or apprentice, or for the advancement or promotion of either of his daughters, whenever and at such times as might be thought necessary and proper; and he directed, that his wife should not have any one or more of her relations to board with her; and that his trustees should and might in such case, or if his wife should marry again, withhold from and refuse * to pay her all or any part or [*610] parts of the said rents, interests, dividends, proceeds and profits, and dispose of the same wholly to the maintenance and education of his children (they being in the event of such marriage of his wife guided by the prudence or imprudence of her choice); and immediately after the decease of his wife in trust, that his trustees, their heirs, executors, &c. should convey unto his said son Thomas Matchwick, his heirs and assigns for ever, or according to the tenure,

his children at his death, will lay hold of any general expression to give effect to this presumed intention, and will not permit such general expression to be narrowed by the context. 2 Williams, Exec. 797. The leading principle is, that where a bequest is to "children" in a class, children in existence at the death of the testator are alone entitled; among which children *in ventre sa mere* are to be considered. Ibid; *Doe v. Clarke*, 1 H. Bl. 399; *Trower v. Butts*, 1 Sim. & Stu. 181. And it will make no difference that the bequest is to children "begotten or to be begotten." Ibid; *Stoors v. Barbor*, 2 M. & K. 46; *Swift v. Duffield*, 5 S. & R. 38.

a message and lands at Elstead ; it being his will that such estate should remain in his family ; and in trust, that his trustees, their executors, &c. should immediately after the decease of his wife assign, transfer, pay and deliver over, unto each and every of his daughters, which might be then living, the sum of 1000*l.* clear, unless they or either of them should have before that time had any advancement or portion given to her or them by virtue of the power before reserved to his said trustees for that purpose, and in such case then only so much as would make the portion or fortune of either of his daughters 1000*l.* only ; and in trust that his said trustees, their executors, &c. should at such time last aforesaid assign and deliver unto all his said children severally and respectively all his household goods, furniture, plate, linen, china and books, she his said wife being permitted to have the use thereof, and also to assign, transfer, pay and deliver unto his said son, his executors and administrators, all the rest of his property : but nevertheless in such last-mentioned respects regarding the minority of the said children, and not investing them with any such property till the full age of twenty-one ; and he appointed the said trustees his executors.

The testator died in 1795 ; leaving his widow, and five children ; of whom three, namely, Thomas, Cornelia, and Sarah, were living at the time of making the will ; and two sons, namely, James and William were born after that time. The testator had another daughter, Sophia, living at the time of making his will : but she died in his life.

The bill was filed on behalf of the infant daughters, Cornelia and Sarah, to have the will established and the trusts thereof carried into execution : and the question was, whether the Defendants James and William Matchwick, the children born after the date of the will, could have the benefit of the provision for the maintenance { *611 } and education of the testator's children during the *life of his widow, the Defendant Ann Matchwick ; or whether the children living at the date of the will were exclusively entitled to that provision ?

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. It is very clear, that if the testator has really forgot, that he may have other children, and has upon the face of the will given to those living at that time, and omits those to be born in future, it is impossible to supply that defect, and to give them any provision, however the Court may wish it ; but by the certificate in a case before Lord Mansfield the Court of King's Bench has gone a vast way towards it ; holding an after-born child entitled, though he was not in contemplation. This testator, bound by every obligation to provide for his children, uses words, which, unless controlled by subsequent words, would be sufficient to comprehend them all. Then comes a power to the trustees to apply a part of the fund in placing out his son Thomas Matchwick or for the advancement or promotion of either of his daughters. That is very strong to show, he had forgot the possibility of having any more. He then goes on to divide his

property after his wife's death, and gives to his daughters each in words, that would take in other daughters: namely and every of his daughters which might then be living. gives the residue to his said son.

It is impossible certainly under this will, to admit afterwards to a share of the residue: or to give them the sums provided for the daughters: but those questions do not arise now. One can suspect, and, if it was not in the case of parent and child, can make the inference, that he intended only to provide for himself and those two daughters: but it was an obligation upon him at his death to provide for all his children. I must construe it as if possible, to apply the words to after-born children; and not to deprive them of the provision, which under the general will may be supposed to have.

Therefore declare, that during the life of the testator's rents and profits of the real estate and the interest of the real estate are applicable to the maintenance, education and bring up of all the children.

I almost wonder, the law of England allows a man to totally disinherit his child, and leave it upon the parish (1).

THE authority of the principal case was recognized, and a similar decision in *Freemantle v. Taylor*, 15 Ves. 363; where (as in the present instance) maintenance during their minority was allowed to infant children of the testator under the terms of his will, could not be let in to participate in the disposition of his property.

WATTS v. BROOKS.

[1798, FEB. 21.]

CONTRACT to be jointly concerned in ship insurances is void by statute 18, s. 12, though the policies are subscribed by the underwriters in their true names; but, though the contract could not be executed, the Court will not exclude the result of it in decreeing a general account. (See the case of *Insuring each other* is not within statute 6 Geo. I. c. 18, s. 12, [p. 613].) A man cannot set up his own illegal act to avoid his own deed, [p. 613]. Smuggling transactions or illegal dealings in stock shall be brought in question in account, though the Court would not execute the contract, (a) [p. 613].

IN 1768 the Plaintiff and Defendant executed a memorial in writing, by which it was agreed between them, that they were equally concerned in whatever policies of insurance they

(1) *Freemantle v. Taylor*, *post*, vol. xv. 363.

(a) The old cases often gave relief, both at Law and in Equity, where a party would otherwise derive an advantage from his iniquity. But the modern Courts have adopted a more severely just, and probably a more politic and reasonable rule, which is to leave the parties, where it finds them, giving no relief, and no maintenance to claims of this sort. See 1 Story, Eq. Jur. § 296, note, where the cases at law and in Equity in illustration of this are collected; *McCullum v.*

write in any office in Liverpool; and that they would each advance one moiety in case of any loss or losses, that might happen in any office or offices. Immediately after entering into this agreement they began to underwrite in their separate names policies of insurance on ships or vessels and their cargoes and freight, and also policies on lives in the offices of the Plaintiff and other insurance brokers in Liverpool; and the joint concern in the business of underwriting was carried on in this manner until the 31st of December, 1780, when the said partnership or connection was by mutual consent dissolved.

The bill prayed a general account of all the aforesaid dealings and transactions.

Mr. *Mansfield* and Mr. *Fonblanque*, for the Plaintiff. This transaction is not within the statute 6 Geo. I. c. 18, s. 12; the insurances having been made in the separate names of the partners. The object of the Act is to prevent joint insurances, in order to give the two great Offices for insurance, not a monopoly, but a preference, by preventing any other insurance by a joint fund: and it is a penal Act. The assured could have recovered upon these policies; and the Defendant in the action could not have averred, that it was in respect of a partnership. Therefore the contract remains. If the policy is not void against the assured, it is not within the Act. It is individual credit. The party could not recover against a dormant partner. *Lees v. Smith*, 7 Term Rep. B. R. 338.

Solicitor General, [Sir *John Mitford*] and Mr. *Stanley*, for the Defendant. The Court cannot sit by and see parties enforce what the law declares to be illegal: *Rooth v. Hodgson*, 6 Term Rep. B. R. 405. The Court is therefore not warranted to make any decree, that shall include insurances upon ships.

[* 613] *Lord CHANCELLOR [LOUGHBOROUGH]. There is nothing immoral in the transaction: but it is against a prohibitory statute. I doubt a little the policy of the Act: but I cannot allow it to be argued, that you can break a law covertly. What you cannot do openly you cannot do secretly. *Lees v. Smith* was upon insuring each other; which is not within the Act certainly. As to the objection, that the assured could recover, a man cannot set up an illegal act of his own, in order to avoid his own deed.

Though I am clearly of opinion that the judgment of the Court of King's Bench upon the Act is quite right, it goes no farther than that the Court will not execute these contracts; but where the parties have had dealings together upon a variety of transactions, and

Johns. 147; *Inhab. of Worcester v. Eaton*, 11 Mass. 368; *Phelps v. Decker*, 10 ib. 267. But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance, that the relief is asked by a party, who is *particeps criminis*, is not in Equity material. The reason is, that the public interest requires, that relief should be given; and it is given to the public through the party. *Ibid.* This Court will not compel any discovery respecting a contract made in evasion, and contrary to the meaning and intent, of the statute. *Fitzgerald v. Arthur*, 1 Irish Eq. 184; *Edwards v. The Grand Junction Railway Co.* 1 My. & Cr. 650; S. C. 7 Sim. 337.

losses have been incurred, and paid, and a general account is sought, I do not execute the contract against law ; but I should do injustice, if I did not give the advantage, if any advantage has arisen, or charge any loss, which has happened. If it was a smuggling business, and they had been settling profit and loss upon a course of smuggling transactions, I should do great injustice, if I did not bring that into the account. So upon stock transactions, though the Court would not execute the contract, yet where the parties have been settling stock dealings, and paying differences, I must bring those into the account.

Direct the account generally (1).

SEE, *ante*, notes 2, 3, and 4 to *Brandon v. Johnson*, 2 V. 517, as to demands growing out of illegal transactions.

PHIPPS v. LORD MULGRAVE.

[1798, FEB. 26.]

10,000*l.* PROVIDED by settlement for one daughter or younger son: 15,000*l.* if more: there being but one daughter, the father by will under a power reserved to him appoints the time of payment and the application of the interest of the 15,000*l.* provided for her by settlement, and gives her the farther sum of 5000*l.* She was held entitled to 20,000*l.*

Charge upon land payable at a future day not vested till the time of payment, (a) [p. 614.]

Bequest of personal estate after a contingent limitation in tail, which did not take effect, established, (b) [p. 614.]

By articles previous to the marriage of Lord Mulgrave, dated the 16th of June, 1787, in consideration of the intended marriage and of the portion of 10,000*l.* which Lord Mulgrave was to receive with his intended wife, he covenanted to settle a competent part of his real estate in the county of York to the use of himself for life ; remainder to the intent, that his intended wife might, in case she should survive him, receive a yearly rent-charge of 1500*l.* for her life ; remainder to the use of trustees, their executors, &c. for the term of 500 years ; remainder to the use of himself in fee ; and it was declared, that the said term * was intended in the [* 614] first place for better securing the said rent-charge ; and without prejudice thereto, by sale or mortgage, and by and with the rents and profits to raise the following portions for the children of the marriage other than an eldest or only son : if there should be but one such child, not being an eldest or only son, the sum of

(1) The latter decision in this case has been over-ruled. See *Ex parte Mather*, *ante*, 373, and the note, 374.

(a) See, *ante*, p. 135, note (a) to *Pearce v. Loman*.

(b) As to limitations of chattels, see, *ante*, note (a) to *Douglas v. Chalmers*, 2 V. 501 ; and as to estates tail in chattels, note (a) to *Fordyce v. Ford*, 1 V. 536.

10,000*l.* to be paid at such time as Lord Mulgrave should by deed or will appoint; and, in default of such appointment, to be paid to such child, if a son, at twenty-one, if a daughter, at twenty-one or marriage: and in case there should be two or more such children, not being an eldest son, to raise the sum of 15,000*l.* to be divided between them in manner therein mentioned; with power to Lord Mulgrave to provide interest at 5 per cent. and in case of no such provision 4 per cent. to be the rate of interest.

The marriage took place. Lord Mulgrave survived his wife, and died upon the 9th of October, 1792: leaving one daughter, the only issue of the marriage; and having on the 8th of February, 1792, duly executed the following will:

"I Constantine John Lord Mulgrave by this my last will and testament give and bequeath all my estates real and personal whatsoever subject to the limitations restrictions and directions hereinafter mentioned or in any codicils or codicil of the same date hereunto annexed in trust to Thomas Lord Longford Abraham Grimes Esq. and Thomas Goulton Esq. for my first and every other son in tail male failure of such issue to my brother Henry and his first and every other son in tail male failure of such issue to my brother Augustus and his first and every other son in tail male failure of such issue to my daughter Ann Elizabeth Cholmley Phipps and her first and every other son in tail male and in failure of such issue to her daughters respectively in succession failure of such issue to the daughters of the last surviving Lord Mulgrave. In all the foregoing cases without impeachment of waste other than wilful. My will is that my real estate shall be subject in the first instance to the payment of the 15,000*l.* provided or intended to be provided for my daughter by the settlement or articles on my marriage that is the interest of the marriage portion at 5 per cent. from the time of my death be paid to her guardians without any account what-
[* 615] soever the whole to be applied by * them or any part to the education maintenance or otherwise as they may judge expedient and the further sum of 5000*l.* on the day of her coming of age or marriage whichever first shall happen to be paid chargeable on my freehold estate."

The testator gave his daughter the jewels, which were her mother's; and after giving some directions, that are not material, appointed his brother Henry and four other persons executors.

The bill was filed on the part of the infant daughter, praying, that she may be declared entitled under the marriage articles and will to the sum of 15,000*l.* and under the will to the farther sum of 5000*l.*; and that the said sums may be declared to have become vested interests on the death of the testator payable at twenty-one or marriage; and that the Plaintiff may be declared entitled to the personal estate of the testator.

Attorney General [Sir John Scott], and Mr. Campbell, for the Plaintiff. The intention was, that the Plaintiff should have 20,000*l.* charged upon the freehold estate. The question is, whether a mis-

take of the event in the mode adopted to give her that sum shall frustrate the clear intention? *Milner v. Milner*, 1 Ves. 106, which in Amb. 476, appears to have been a very solemn determination, is extremely like this case. *Savile v. Blacket*, 1 P. Wms. 777, and *Williams v. Williams*, 2 Bro. C. C. 87, also bear upon it. The intention to give a sum of money shall be executed, though the fund fails or does not exist. Here the fund exists to the amount of 10,000*l*.

As to the second question, upon the validity of the disposition of the personal estate, *Clare v. Clare*, For. 21, is in favor of the Plaintiff: but there certainly are many cases against it (1).

Solicitor General [Sir John Mitford], and Mr. Ward, for the Defendant. The cases cited upon the first point do not apply without assuming the real question: viz. as to the intention. In *Milner v. Milner* there was an express declaration, that the daughter should have 10,000*l*. Here there is no declaration of a design, that the Plaintiff shall have 20,000*l*. The question is, what the testator means by the marriage portion? It is the portion, he received upon his own marriage. The words "that is" necessarily govern the whole of the subsequent words.

* Upon the other point *Clare v. Clare* is repeatedly [*616] cited as an authority, and even by Mr. Fearne; it ought therefore to be known, that it has been repeatedly over-ruled; particularly in *Sabarton v. Sabarton*, For. 245, which Lord Talbot directed to go to the Court of King's Bench; and in his own note-book he prefaces that direction by observing, that there had been a variety of opinions touching the validity of limitations of personal estate after a contingent limitation in tail. In *Knight v. Ellis*, 2 Bro. C. C. 570, Lord Thurlow was much perplexed between the two cases, *Stanley v. Leigh*, 2 P. Wms. 685, and *Clare v. Clare*; as Lord Talbot when he decided the latter, must have had the former fresh in his memory.

LORD CHANCELLOR [LOUGHBOROUGH]. That point is quite clear. I have taken it to be most perfectly understood, that *Clare v. Clare* was destroyed by *Sabarton v. Sabarton*. I remember many years ago hearing Mr. Forester speak of it in that manner.

Upon the other point, it is plain beyond a doubt, that Lord Mulgrave at the date of the will, a very little before his death, was speculating, what his daughter would have, not only what she would have ultimately, but what would be the allotment for maintenance and education; which he gives out of the interest of the marriage portion at 5 per cent. to be paid to her guardians without account. He meant, she should have 15,000*l*.; the interest at 5 per cent. payable for maintenance; eventually and contingently, that 5000*l*. should be added. The mistake, he fell into, was, that he thought, she would have been entitled under his marriage settlement to 15,000*l*. as a marriage portion. That is what must have been

(1) See Mr. Williams's note in the last edition of Forester.

in his mind. There is great difficulty in construing it the portion, he received upon his marriage. He might forget the portion provided for a daughter: but he could not forget, that he had received 10,000*l.* upon his marriage. He recollected, that 15,000*l.* was settled: but he mistook the event. Upon that supposition he thought fit, having dominion over the whole fortune, to give 15,000*l.* and 5000*l.* as the fortune, he thought proper for an only child. It is the common case, where the *quantum* is clear, but there is a mistaken description; and is precisely *Milner v. Milner*.

I do not think the 5000*l.* vested. Declare, that the Plaintiff will be entitled to 15,000*l.* and 5000*l.* upon her coming of [* 617] age or *marrying; with liberty to apply upon either of those events; and in the mean time the interest of the 15,000*l.* at 5 per cent. to be applied. I must take care to make no declaration, that it is a vested interest (1).

1. A REQUEST over, of personal estate, after a contingent limitation in tail, is valid; though, if the contingency happened, the property would be absolute in the first taker. *Lyon v. Mitchell*, 1 Mad. 479, 486. And a limitation over, of real property, after a devise of a previous estate tail in the same lands, may be good, notwithstanding the preceding estate tail never takes effect. See, *ante*, note 2 to *Holmes v. Cradock*, 3 V. 317.

2. It is a maxim, adopted by our own Courts of Equity from the Civil Code, *falsa demonstratione legatum non perimi*; *Whitfield v. Clement*, 1 Meriv. 404; and as a mistaken description of the subject of gift will not invalidate a legacy where the intent is clear; (*Clark v. Guise*, 2 Ves. Sen. 618); so, a mistake in computation will be rectified. *Milner v. Milner*, 1 Ves. Sen. 107; *Danvers v. Manning*, 2 Brown, 22.

3. That a portion charged upon land, and payable at a future day, does not vest till the time of actual payment comes; see, *ante*, note 4 to *Stackpole v. Benmont*, 3 V. 89.

PRINGLE v. HODGSON.

[1798, FEB. 27.]

SETTLEMENT after marriage of stock standing in the name of the wife, the husband being insolvent, and soon after a bankrupt, set aside upon the bill of the assignees after the death of the husband; the stock did not survive; but was decreed to the assignees, subject to a provision for the widow. (a)
Assignees of a bankrupt recovered in an action against the Bank, stock standing in the name of the wife, [p. 620.]

ELIZABETH BELL, being entitled to the sum of 850*l.* 4 per cent. Consolidated Bank Annuities standing in her name, in July 1796,

(1) See Mr. Cox's note to *The Duke of Chandos v. Talbot*, 2 P. Wms. 612; and *Pearce v. Loman*, *ante*, 135.

(a) Assignees take the property subject to all the equities, which affect the bankrupt: and so, would be bound to make a settlement upon the wife out of her *chose* in action and equitable interests assigned to them, as the husband would be bound to make one. See 2 Story, Eq. Jur. § 1411, and cases cited; *Mumford v. Murray*, 1 Paige, 620; *Smith v. Kane*, 2 Paige, 303; *Van Epps v. Van Deusen*, 4 Paige, 64. See, *ante*, note (d) to *Ball v. Montgomery*, 2 V. 607.

married William Hodgson. No settlement was made: nor was any agreement for a settlement entered into. In August 1796, William Hodgson being insolvent and very much distressed, and being actually arrested, prevailed on his wife to join him in selling out 400*l.* part of the said 850*l.* Bank Annuities: and the money produced by the sale was applied in discharging the debt, for which Hodgson was arrested, and other debts due by him. In the same month Hodgson and his wife joined in a transfer of the remaining sum of 450*l.* Bank Annuities, then standing in the maiden name of Elizabeth Hodgson, into the joint names of John Nanson and Samuel Rochat; and by indentures of settlement executed upon that occasion, dated the 6th of August, 1796, it was declared, that the said 450*l.* 4 per cent. Consolidated Bank Annuities had been transferred into the names of John Nanson and Samuel Rochat upon trust to pay the interest and dividends thereof, as the same should become due and payable and be received during the life of said William Hodgson, unto such person or persons and for such purposes only as Elizabeth Hodgson should or might by any writing or writings under her hand from time to time notwithstanding her coverture appoint; and for want of and until appointment, into her proper hands for her sole and separate use exclusive of her husband, who was not to intermeddle therewith; nor were the same or any parts thereof to be subject to his control, debts, contracts or engagements; with the usual clause, that the receipt of her, or the persons, she should appoint to receive the same, should be a sufficient discharge; and after the decease of William Hodgson, leaving his wife surviving, upon trust to transfer the said 450*l.* Bank Annuities to Elizabeth Hodgson, her executors, * administrators and [*618] assigns. By this settlement also a legacy of 400*l.* the property of William Hodgson, was assigned upon similar trusts for the benefit of his wife.

William Hodgson was before and at the time of executing the said indenture in distressed and insolvent circumstances; and upon the 10th of January, 1797, a commission of bankruptcy issued against him. In March 1797 the bankrupt died; having appointed George Pringle, the assignee under the commission, his executor.

The bill was filed under the assignee to have the settlement set aside, as fraudulent and void as against the creditors of the bankrupt. The Defendant Elizabeth Hodgson gave up the legacy; but insisted, that she was entitled to the 450*l.* stock absolutely, or in all events to a proper provision thereout. By her answer she stated, that at the time of her marriage she was ignorant, that William Hodgson was insolvent or distressed; and that the transfer of the 450*l.* stock took place without any solicitation on her part: but she admitted, she knew his situation at the time of executing the settlement.

Attorney General, [Sir John Scott], and Mr. Piggott, for the Plaintiff. It is contended, that the stock, not being reduced into possession by the husband, survived to the wife; but the question turns upon this: what power the assignees had to dispose of the

property; the bankruptcy happening in the life of the wife. They may dispose of it subject to a provision for the wife. The settlement, being after marriage, and when the husband was in the jaws of bankruptcy, is fraudulent at law. The husband had no occasion to come into this Court. He might have sold this property, or have assigned it for the payment of a particular creditor or of all his creditors. All the cases upon this subject were reviewed by Lord Thurlow in *Worral v. Marlar*, in Mr. Cox's note to *Bosvil v. Brander*, 1 P. Wms. 459 (1).

Mr. *Richards* and Mr. *Cooke*, for the Defendant, the Widow. This poor woman gave up 400*l.* of this stock for the satisfaction of her husband's creditors. If she had resisted the transfer, [* 619] the *husband or his assignees must have come into equity: then there must have been a settlement; and 450*l.* out of 850*l.* would not have been thought unreasonable. As executor the Plaintiff is not entitled; because it is a *chose in action*, or rather in equity, belonging to the wife; which necessarily survives. The husband by transferring her own property to her cannot be considered as reducing it into possession. As assignee the Plaintiff is in precisely the same situation as the husband; and therefore cannot be in a better situation than his executor. Being only general assignee by operation of law, not a particular assignee, he must stand in the situation of the husband, subject to her right of survivorship. The law can only transfer the wife's right, where the husband, or the person, to whom it is transferred, can obtain it at law, or get possession of it without coming to this Court: but wherever the party is obliged to come here, there is an equity for a settlement. It was impossible for the husband to have obtained possession without coming here. The Bank would not have suffered a transfer by any person but the wife. They have done by their own agreement what the Court would have compelled; and therefore it is valid.

The *Attorney General* in reply said, this was not like the cases, where, the fund being in this Court or in the hands of trustees, the husband is obliged to resort to this Court: he might have brought an action against the Bank.

Mr. *Piggott* (Counsel for the Bank) said, the Bank do make a difficulty: but if the husband insists upon his right, they hold themselves bound (2).

Lord CHANCELLOR [LOUGHBOROUGH]. The assignee at law has a right to the *chose in action* of the wife; and the law reduces it into possession (3). The bankrupt laws give over all, that the husband

(1) As to a particular assignment by the husband for valuable consideration, see *Like v. Beresford*, ante, 506.

(2) *Wildman v. Wildman*, post, vol. ix. 174.

(3) Sir W. Grant, Master of the Rolls, in a very able judgment, *Milford v. Milford*, post, vol. ix. 87, established the right of the wife, having survived her husband, to a legacy of stock, in trust for her, against the assignees under a commission of bankruptcy against him; distinguishing this case by the circumstance, that at the time of the marriage the stock stood in the wife's name. See Mr. Christian's observations on that judgment, 1 Christ. Bank. Law, 265.

had or could dispose of, to the assignee. The Plaintiff does not dispute her claim to a provision; but what was the necessity for coming into equity? A deed was done by the husband, that was fraudulent and void as against the creditors. For what purpose do they come here? Only to get rid of this deed; which I must of course have set aside. I cannot restore her to the 400*l.* which she gave her husband, and which he spent. This part of her property, that remains, is vested by law in the assignees; and the question of survivorship is quite laid aside by the bankruptcy. A few years ago in a case *of this kind an action was brought [*620] against the Bank for stock, that stood in the name of the married woman; and they recovered. The Bank permitted a defence to be made; and the question was, whether the Bank holding the Books was a trustee for the married woman. The Court of Law said, No. The Bank very rightly throw difficulties in the way of it.

I rather wish in these cases to take it upon the offer of the parties, and not to make a reference. The wife does not fare the worse for it. The creditors generally act very handsomely with respect to her; and it saves expense.

The Plaintiff offering to give her half, the settlement was declared void; and 225*l.* of the 450*l.* Bank Annuities was directed to be transferred to the Defendant (1).

1. THAT the Bank of England, though they make difficulties as to allowing a husband to transfer his wife's stock, standing in her name; yet feel themselves bound to concede, if the husband insists upon his right; was again stated in *Wildman v. Wildman*, 9 Ves. 176.

2. As to the right of a *feme covert* to a provision, in respect of her equitable interest in property taken by her husband's assignees; see, *ante*, the note to *Burdon v. Dean*, 2 V. 607.

BRAMLEY v. ALT.

[ROLLS.—1798, FEB. 16; MARCH 1.]

AT an auction one person only bid for the vendor to 75*l.* an acre, upon a private notice to the auctioneer: then after a contest with real bidders the estate was bought at 101*l.* 17*s.* an acre; and the purchaser some days afterwards paid the duty: he was decreed to perform the contract with costs. (a)

Where all the bidders at an auction except the buyer are bidding for the seller without notice, and the buyer is thereby induced to give more than the value, neither Courts of Law nor Equity will support it, [p. 624.]

† No objection to a sale by auction, that persons were employed by the vendor to bid for him without public notice, [p. 627, note.]

THE bill was filed to compel the Defendant to complete the purchase of a freehold estate in Leicestershire; which was sold by

(1) *Ante*, *Brown v. Clark*, *Freeman v. Parsley*, 166, 421; *Burdon v. Dean*, *Oswell v. Probert*, vol. ii. 607, 680, and the note, 609.

(a) According to the early decisions, the employment of puffers by an owner to bid for him at an auction, was a fraud upon the real bidders. He could not enhance the price by a person privately employed by him for that purpose;

auction to his agent Richard Start, as the best bidder, at 101*l.* 17*s.* an acre.

The answer stated, that Start was not authorized to bid so high; and did so contrary to the express direction of the Defendant. The Defendant coming into the auction room at the sale, and before Start had bid any thing near the price, at which it is alleged, he purchased for the Defendant, and observing, that there were setters, or persons employed by the Plaintiff or on his behalf to bid against Start, who was known to be bidding for the Defendant, and Start having then bid as much or more than the said close or meadow was worth, or than the Defendant would have given, the Defendant openly discharged and forbid Start from bidding any more, he having then bid eighty guineas an acre or thereabouts; but Start being at that time evidently intoxicated proceeded, and bid several times afterwards.

The Defendant has been credibly informed since the sale, [* 621] and verily believes, *that one or more person or persons attended by the Plaintiff's desire, and were employed by him as his bidders, without any intention of buying for themselves, but merely with a view to raise the biddings of the Defendant; and that such person or persons bid against Start with that view. The Defendant refused to sign the memorandum of agreement to take the purchase: but Start being much intoxicated was prevailed upon to sign contrary to the express direction of the Defendant. The Defendant admitted, that upon the Thursday after the sale the Plaintiff persuaded him to go to the office of his agent, and to pay one half of the auction duty, which he did, not intending to confirm the sale, but confiding in assurances of the Plaintiff, that he would not insist upon the sale, but would take a fair and equitable price, if left to his generosity.

but if he were unwilling that his goods should be sold at an under price, he might order them to be set up at his own price, and not lower, or he might previously declare, as a condition of the sale, that he reserved a bid for himself. *Berwell v. Christie*, Cowp. 395; *Howard v. Castle*, 6 T. R. 642. And this doctrine seems to be approved in 2 Kent, 538, 539 (5th ed.), and 1 Story, Eq. Jur. § 203. It has been adopted also in later English decisions; *Crowder v. Austin*, 2 Car. & P. 208; *Wheeler v. Collier*, 1 Mood. & Walk. 123; *Fuller v. Abrahams*, 3 Brod. & B. 116; S. C. 6 Mopre, 316. There are other cases, however, which have admitted a qualification of this doctrine. Among these is that of the text, and *Steele v. Ellmaker*, 11 S. & R. 86. It has been decided in several American cases, that contracts, by which one party stipulated not to bid against another at an auction sale, or an agreement by one to bid for the benefit of himself and the other party, were contrary to public policy and a fraud on the vendor. *Jones v. Caswell*, 3 Johns. Cas.; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Dudley v. Little*, 2 Ham. 505; *Picatt v. Oliver*, 1 McLean, 295; *Gulick v. Ward*, 5 Halsted. According to other decisions the validity of such agreements is made to turn on the *quo animo*, and they may be valid if made *bona fide* for the sole purpose of preventing a sacrifice of the property. *Wolfe v. Luyster*, 1 Hall, 146; *Jenkins v. Hogg*, 2 Const. (S. C.) 821; *Smith v. Greenlee*, 2 Dev. 126; *Small v. Jones*, 1 Watts & Serg. 128; *Phippes v. Stickney*, 3 Metc. 384, where the subject is discussed with clearness, and the authorities are carefully examined. But an association of bidders, with a design to stifle competition, is a fraud upon the vendor. *Smith v. Greenlee*, 2 Dev. 126. See also *Morehead v. Hunt*, 1 Badg. & Dev. Eq. 35; *Moncrief v. Goldsborough*, 4 Harr. & M'Han. 281; *Troughton v. Johnstone*, 2 Hayw. 328.

The Plaintiff's agent proved, that when the premises were knocked down to Start, the deponent asked the Defendant to let him make the conveyance: the Defendant said, he had no objection. Being applied to for the duty and deposit, he said, he would call and pay the duty on Thursday: which he did. He said, he would pay the deposit in a fortnight; and upon a subsequent application he said, it was of no consequence; he had a claim upon the Plaintiff, and would settle it with him.

For the Defendant one witness deposed, that the Defendant was present at the latter part of the auction, and forbid Start from advancing upon the price then bid; which was about ninety guineas an acre; and declared aloud several times, that he would not have the land, if Start bid any more: Start bid several times afterwards; and upon every such bidding the Defendant declared, he would not have it; and he refused to sign the agreement.

Thorpe deposed, that he was requested by the Plaintiff to bid on his behalf to the amount of seventy guineas or 75*l.* to prevent its being sold under that price; and did accordingly bid on behalf of the Plaintiff to between sixty and seventy guineas.

Mills deposed, that he and Whale were real bidders.

The auctioneer deposed, that after ninety-four guineas were bid the Defendant had some conversation with Start relative to not bidding any more; and said, he thought, he had bid enough; but * the deponent did not understand it to be an absolute [* 622] discharge. Start bid twice afterwards. Whale and Mills were real bidders; and one of them bid ninety-six guineas. Previously to the auction the deponent received a notice in writing from the Plaintiff that Thorpe was employed to bid on his behalf to prevent its being sold under a fixed price; which the deponent thinks was 75*l.* an acre.

There was evidence, that Start was intoxicated, but not so as not to know what he was about.

Upon the 11th of May, 1797, the Master of the Rolls directed an issue to try, whether the Defendant did by Start, his agent, contract or agree for the purchase of the premises at the price in the agreement in the pleadings mentioned: with liberty to indorse any thing special upon the *Postea*.

It was tried before Baron Hotham at the last Assizes for Leicester. The jury found, that the Defendant did contract for the purchase at 101*l.* 17*s.* an acre; and they indorsed, that Thorpe was employed by the seller to attend at the sale for the purpose of advancing the value of the estate, of which there was no notice given to the bidders; that he did bid for it, whilst the biddings were under seventy-five guineas; and that there were no other puffers at the sale.

The cause came on upon the equity reserved (1).

(1) This case was argued by Mr. Graham, Mr. King, and Mr. Vaughan for the Plaintiff; and Mr. Lloyd and Mr. Allcock, for the Defendant. The general point, of great importance to the public, whether a vendor by auction, having employed persons to bid on his behalf, can hold the purchaser to his contract, having been

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. When this cause came on, it was insisted, that under the circumstances the Court would not enforce performance of the agreement; and that upon the allegation, of which the Defendant gave some proof, that persons were employed, by whose means the biddings were raised, this was such a bargain as neither a Court of Law nor of equity would enforce; upon which I directed the issue. Upon the Equity reserved it was contended, that under these circumstances

the agreement is either void at law on account of the [*623] person employed to bid up to *seventy-five guineas for the vendor, or at least that a Court of Equity would not enforce it. There being some doubt in my mind as to the defence, because the Defendant had examined several witnesses in equity, and it does not appear, any were examined at the trial, I have obtained the Judge's report, from which it appears by the evidence of Boot, the auctioneer, that Start bidding for the Defendant, and Whale and Mills both bidding for Mills, after they got to seventy-five guineas an acre, went to ninety-seven guineas; that Boot had no discharge from the Defendant from taking the bidding; that the Defendant when he saw him again in June said, he had made a sore bargain in selling him that estate; that Thorpe bid, while it was under seventy-five guineas; that notice was given to Boot before the sale, that Thorpe would bid for the Plaintiff; that Boot thought it a fair sale; and that the Defendant did not discharge Start; but said, he thought he had bid enough. Mill's evidence as to what passed at the sale is to the same effect: he said, he was a real bidder; and that the Defendant had a meadow adjoining these premises, to which he had no convenient road but by purchasing this. The evidence of Craddock the Plaintiff's agent, is to the same effect as his deposition; and he says, he heard the Defendant say to Start "hold your tongue: there is enough bid: who is to find the money?" but after that Start bid twice.

No witnesses were called for the Defendant.

The Judge declined giving any opinion as to the law of the case. It is contended, as a point established by *Howard v. Castle*, 6 Term. Rep. B. R. 642, that neither Courts of Law nor of Equity will support this sale. I have looked into that case; which was relied upon at the trial, and is the only defence set up against the performance of this agreement. Upon that case there is no doubt, that no man shall be compelled to abide by such a bargain: no person being present but the buyer and the persons bidding on behalf of the seller; and in consequence of his zeal he was induced to bid; thinking, he was bidding against real purchasers. The Judges were of

more directly in question, and having received a very full and able discussion in a late case, in which, though it ended by compromise, the opinion of the Lord Chancellor was strongly marked by the observations, that fell from his Lordship, and by their effect upon the terms of the compromise; a note of what passed on that occasion with respect to that point is inserted at the end of this case; and the general reasoning in both the arguments is there stated.

opinion, that it was a mere fraud upon him as a purchaser; that a man going to an auction has a right to expect, that he is bidding against real purchasers. He may be induced upon that supposition, which he has a right to make, to give as much as any man will for himself; and if he is induced to bid by that method, he has been the dupe of a fraud. I perfectly subscribe to that: but is this a case of that complexion; and am I to *understand, that [* 624] if at any sale any one person bids for the seller without having declared it, though he ceased to bid, and the purchaser pursued his bidding against *bona fide* bidders, he shall from the mere circumstance of that one person bidding for the seller avail himself of that to put an end to his contract? I can collect no such thing; and should be sorry, that was to prevail. On the contrary I see it expressly stated, that no other persons were present but those, who bid on the part of the seller. I am told, the Lord Chancellor in a late case (1) intimated, that he could not consider himself bound to hold, that the purchaser could refuse to abide by the contract, because there were persons, who bid for the seller. I do not know, whether his Lordship gave any opinion. I have no doubt, that if there were none but puffers, and a person was induced by that method to give more than the value, neither Courts of Law nor of Equity would support it. I was amazed to find, no witnesses were examined for the Defendant: but it now appears, that the reason, which induced his Counsel very properly not to call any, thinking it would be vain, was, that several days afterwards he confirmed the sale by paying part of the auction duty (2); which he states by his answer he was rather inveigled into. The fact is, that at the sale one person was authorized to bid for the seller as far as seventy-five guineas; and did so. It is said, that ought to have been proclaimed. No doubt, a man may buy in an estate; for the Statutes (3) authorize the auctioneer not to pay the duty, if it is bought in; but it is said, that ought to be an open declared thing. Where is the difference between that and setting it up at seventy-five guineas? The Judge's report shows, this fictitious bidder did not induce him to go on; for afterwards began the contest between him and Mills; who swears, he was a real bidder. Can I say, the Defendant was induced by the fraud of the seller to bid what he would not have given, if he had not been so induced? Therefore without impugning the authority of that case, to which, as stated, I perfectly subscribe, I am clearly of opinion, that no fraud was practised upon the Defendant; that he was bidding at a fair sale; and became the purchaser; and I do not believe, the Judges meant, that if one person was bidding for the seller, that shall vitiate the bargain, if

(1) See the note at the end of this case.

(2) This was declared to be the reason by one of the Counsel, who attended the trial.

(3) 17 Geo. III. c. 50, s. 10; 19 Geo. III. c. 56, s. 12, and 28 Geo. III. c. 37, s. 20.

under all the circumstances that does not operate as a fraud upon the buyer. This contract therefore ought to proceed.

[* 625] * Then as to the terms, this is one of the most litigious and ill-grounded defences, that ever was made. The defence, he set up in equity, he does not venture to prove by a *visa voce* examination. His counsel very properly thought, it must fail of effect. Therefore as there is no reason to impute any fraud to the seller, I am of opinion, the Defendant is not only bound to fulfil the contract, but to pay the costs, not only of this cause, but of the issue at law (1).

WHERE AN AUCTION is announced as intended to be "without reserve;" but in fact, a person is employed on behalf of the vendor to keep up the price; as the vendee may have been drawn in by this breach of faith, Equity will not support the sale. *Meadows v. Tanner*, 5 Mad. 37. But where the particulars of sale contain no condition against it, the appointment of a single bidder is no more than a reasonable precaution on the part of the vendor to prevent the sacrifice of his property at an inadequate price. *Ord v. Noel*, 5 Mad. 440; *For v. Wright*, 3 Mad. 112. The employment of several bidders, cannot, however, be necessary for this protective purpose, it must be intended merely to take advantage of fictitious competition; and a court of Equity will not compel a purchaser, under such circumstances, to complete his contract. *Smith v. Clarke*, 12 Ves. 483.—[HOVENDEX.]

(1) *Conolly v. Parsons*, in Chancery 5th, 7th, and 8th of August, 1797. The bill was filed by the executors of the late Lord Buckinghamshire to compel the Defendant, who was the best bidder at a sale by auction of the testator's house in Bond-street, to complete his purchase; and to restrain him from proceeding in an action, he had brought to recover the deposit. The answer raised several objections on the ground, that the premises were not truly described (as to which see *Calverley v. Williams*, and *Calcraft v. Roebuck*, ante, vol. i, 210, 221.) It is also stated, that persons * were employed to bid, and did bid for the Plaintiffs, for the purpose of fraudulently advancing the price above its fair value; but it was not averred, that there was no real bidder. The cause was heard on bill and answer; and a specific performance was decreed; the last objection being very little noticed: but upon a rehearing at the petition of the Defendant it was made a principal topic of argument.

Solicitor General, Mr. Mansfield, Mr. Alexander, and Mr. Holford, in support of the Decree.

In support of this objection *Howard v. Castle*, lately determined by the Court of King's Bench, will be cited: a case, in which that Court did think proper to hold a doctrine, perhaps in a certain degree new, but which does not at all apply to this case. There was no real bidder; and probably some improper conduct was used; by which means property of the value of 273*l.* was carried up to 357*l.* and the purchaser refused to have any concern with it. Whatever may be said of that case under the particular circumstances, it is in no degree applicable to this. The practice is notorious; and the several Acts of Parliament, 17th, 19th, and 28th of the present King treat it as perfectly well known; and remit the duty, if notice is given to the auctioneer; a private notice merely on account of the duty; not a public notice. In a very late case before the Court of Exchequer and afterwards upon an appeal to the House of Lords, Mr. Christie not having taken the precaution to have those notices properly made, was obliged to pay 5 or 6000*l.* out of his own pocket for the duty; the sales being held real. If *Howard v. Castle* can have any effect, it can be only under the same circumstances; and where the purchaser at the time of the sale declares, he will not be bound on account of those circumstances; not after all the transactions, that have taken place in this case; a correspondence between the parties; a written agreement signed by them; a treaty for sale of the premises by the Defendant to a third person.

* Mr. Sugden (Law of Vend. & Pur. 23, 5th edit.) says, that in fact one person only was employed, and bid, for the vendors.

Any objection must be considered waived. Till the answer this objection was never made. The answer does not aver, that there was no real bidder. The reasoning of Lord Mansfield in *Berwell v. Christie*, Cowp. 395, was made the ground of the last decision in the Court of King's Bench. How can a practice universally known to be used at every auction be fraudulent? How can it be compared, as it is in *Berwell v. Christie*, to things in themselves fraudulent, or made so by positive law; as gaming, stock-jobbing, and swindling? The constant expression of advertisements, that the article shall be sold without reserve, meaning to intimate, that it shall be really sold to the best bidder, proves the practice. Property would go for nothing without this sort of management. It is the common practice for bidders to agree not to bid against each other for particular lots. Frequently people will not bid from respect to a particular bidder; others, because one person is known to go any length to carry his point. How can the vendor be upon even terms with such people? If he is not allowed a bidder for himself, he is at the mercy of those, who come into the room.

Attorney General, Mr. Grant, and Mr. Stratford, for the Defendant. That this Court will not entertain a bill, where an action could not be maintained, is now done away; (see *Cannel v. Buckle*, 2 P. Wms. 243, and Mr. Fonblanque's note, Treat Eq. vol. i. 139.) On the contrary the jurisdiction is most useful, where the circumstances are slight, and make a ground in conscience, that would not be available at law: but the Court will not entertain a bill, where an action would not lie on account of a fraud. Therefore if it can be rendered strongly probable, that a Court of Law would hold the sale bad upon this objection, it ought to be tried in an action, before the decree is made. In *Twining v. Morrice*, 2 Bro. C. C. 326, Lord Kenyon thought, it was by an accident that the Plaintiff got the estate for less than the value: but though there was no fraud, no circumvention, hardly what was to be called surprise, a specific performance was refused; and he was left to an action. Lord Kenyon there seems to have had considerable doubt, whether the frequency of the practice would not be an answer to the illegality; but that * cannot be. If it remains in doubt, we ought to be [* 626] permitted to try it. The only other case to be found upon it is *Walker v. Gascoigne*, 13 Vin. 544, which goes no farther than that, if A. employs B. to enhance the price of goods at an auction in prejudice of third persons, no action shall arise between A. and B.; but the reason is, that on that account it cannot be made the ground of a civil contract.

In *Walker v. Nightingale*, 3 Bro. P. C. 263, the appeal upon the case in *Viner*, Lord Macclesfield having made no allowance to the Plaintiff, who made a claim for having acted as puffer, he appealed to the Lords Commissioners; who dismissed the cross bill with costs; and his appeal to the House of Lords was dismissed with 100*l.* costs. Nobody was imposed upon there; and the puffing was in reality to counteract an intended fraud on the other side. The objection therefore arose entirely from the nature of the contract. Lord Mansfield's opinion in *Berwell v. Christie* is, that employing a person to bid for the vendor without informing those in the room would entitle the buyer to say, he would be off the bargain; though that case is between other persons. Lord Mansfield reasons upon the nature of the contract between *Berwell* and *Christie*, and upon the consequence to third persons, if the direction had been followed. Though in the last case in the Court of King's Bench the circumstance, that there was no other bidder, made part of it; it cannot be denied, that the opinion of the Court was, that if there was any bidding for the owner not disclosed, the purchaser might be released from his contract. The judgment of Mr. Justice Ashhurst is upon that distinct, clear, short, proposition; and Lord Kenyon approved all, that Lord Mansfield said in the former case. Persons bidding for the vendor attend for no other purpose but to mislead the judgment, and raise the price upon the buyer beyond what any person who really wants the thing, will give. If there is any fraud in ten people bidding for the vendor, there must be some fraud in one doing so. If one bidding is for a real bidder, the next for the vendor, and then I bid, it is absurd to say, I cannot be off the bargain, when, if the first bidding was also for the vendor, I might. The question is, whether an imposition is attempted to be practiced upon me in any degree by the vendor. The Plaintiffs not having replied, we have no opportunity of proving the fact, as it really was. They might have amended the bill to know, when the Defendant discovered it. The advertisements to sell without re-

serve do not bear upon it: neither do the Acts of Parliament. If under certain circumstances this practice was legal before those Acts, they ought to be applied to such purchases only. A purchaser judges of the value by his own judgment and the information of others. If he sees ten persons, to be supposed not connected, bidding as if for themselves, the fact conveyed to his mind is, that there are ten persons, who think the property of that value. Great competition is evidence, that it may be of much greater value, than he thought. Suppose, he sees several surveyors bidding for a house: that will influence his judgment. An auction is upon a different principle from a private sale. In the former the vendor renounces the right of fixing the price; and agrees to sell at such price as a competition shall raise it to. The value is out of the question on both sides. The principles are applicable, which govern a contract familiar to the Roman Law: namely, *addictio ad diem*; that you shall have this at such a price, provided, before a given day nobody offers more. Cicero states the opinion of Diogenes, that where the purchaser does exercise his judgment, there can be no fraud by the seller, because there is no compulsion. Cicero reprobates that doctrine as bad not only in morality but in law. Here there was no compulsion; but how are men's judgments exercised? Not by the abstract merit, but by a great many extrinsic circumstances. In buying pictures, which have no intrinsic value, a man is drawn in by seeing others bid.

[* 627] * *Reply*. If it is not to be stated as a strict rule of law, which the Statutes clearly show it is not, in what case is it to be decided, that a person bidding for the vendor avoids the sale? *Betzell v. Christie* is not between vendor and vendee. *Howard v. Castle* is fraud throughout. *Walker v. Nightingale* is totally different. It was merely mentioned incidentally as one reason among a variety of others for refusing the account. A commission of 3 per cent. upon the management of sales was demanded. The Court must have held, that there was nothing in evidence warranting them to go into that part of the case; and it was merely to evade payment of the notes due to the estate of Sir Robert Nightingale; which were the principal subject of the suit. When the practice is notorious, it cannot be said, *aliud simulatum, aliud actum*. The notoriety of the practice supplies the want of express notice. The Acts of Parliament plainly recognize the practice as not stamped with any sort of fraud. The fraud intended by them is merely with regard to the revenue. *Twining v. Morrice* considerably lessens the authority of the case in Viner; and all those cases referred to by Viner are from the index supposed to be by Lord Harcourt.

LORD CHANCELLOR [LOUGHBOROUGH.] It was by Lord Harcourt's Secretary (see *ante*, vol. ii. 159: *post*, x. 307.)

Reply. The Defendant does not aver, that he did not know, that it was the practice. There is no averment in the bill; as there was no apprehension of such a defence. There are many instances of trustees buying in an estate, because they could not get the price.

The LORD CHANCELLOR during the argument made the following observations: This point comes now before me very much by surprise. I should not have thought, the case decided by Lord Mansfield bore much upon it. The last case carries a great degree of authority with it: but I fancy, it turned upon the circumstance, that there was no real bidder; and the person refused instantly. It was one of those trap auctions, that are so frequent in this city. The reasoning goes large certainly; and does not at all convince me. I should wish it to undergo a reconsideration; for if it is law, it will reduce every thing to a Dutch auction, by bidding downwards. I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment, because other persons bid; that the judgment of one person is deluded and influenced by the bidding of others. It may weigh, if A. a skilful man, B. a cautious man, and C. a wealthy man, are in competition: but where it is publicly known, that persons are employed to bid, it would be very foolish in any one to let himself be so influenced.

The acts of Parliament go upon its being a usual thing and a fair thing for the owner to bid. The pressure, when the tax was imposed, was by embarrassing people, who chose to dispose of their goods by auction, if they chose to be the purchasers, by the tax falling upon them. I think, it would have occurred either to Lord Thurlow or to me, when the exception in favor of the owner was proposed, that the case could not exist; as the owner could not be a bidder; or that for his

attempting to do what he could not by law it would be just, that he should pay the duty. It was very wrong to the public to let that clause stand, if at the time it was understood, that the owner bidding was doing an illegal thing. The Acts do not require an open notice, but only a private notice to the auctioneer, and an oath to prevent the setting up a bidding for the owner, that the bidder might evade paying the duty.

Have you found any thing in the text of the Civil Law, which at all supports Huber, a very respectable writer, the more so from having been adopted by Lord Mansfield? He takes it as a principle of high morality. We learn from the position taken by Lord Mansfield, that it was a question of high morality in the Stoical school; and it was not adopted by one set of Stoics; and Tully in the Offices says, it goes beyond the law and custom. If you go upon the strict morality, all bidding up is treated by him as against morality. He reckons it a fraud according to that part of the Stoic school, he adopted, to offer less, than you think the worth of the thing. He then gives the instance of the Roman Scævola; who, admitting it to be worth more than he had bought it for, paid the difference; and he considers it very properly an act of munificence and high morality.

* Find upon these general principles an apology for the Court of [628] Chancery selling estates. What should I say to trustees for infants, who put up the property, they had estimated and valued, and did not take care, that it should not go under that value? It is their duty to have it valued, and to take care, that it shall not go for less; and it is very difficult for them to sell by private contract. The consequence would be, every sale of an estate must be by decree. Then from the Master's office they come boldly here; saying, they have bought it in, and desiring to have it put up again.

I have seen public advertisements of lots put up again as lots bought in for the owner. If it is considered as a contract with all the world, he cannot countermand the sale and sell by private contract. They meet upon these terms: the seller has fixed the value in his own mind; but hopes to get more: the buyer has done the same; but hopes to get it for less. They stand entirely equal. If it is unfair for the seller to get more, it is equally unfair for the buyer to get it for less. It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody for the seller. The buyer goes to the sale with this knowledge, that he shall not get the article under a price, the seller thinks to be a reasonable price. There are several articles sold almost always by auction, that could not possibly be sold so, if the vendor was not allowed somebody to look after his interest. There are not above three or four purchasers of scarce and valuable books: they would divide them, if the person selling has not some means of guarding against that.

I should be extremely glad to find any case, that would draw into consideration what might be all the consequences of applying that philosophical doctrine, as I call it, to sales by auction. It goes no farther in point of authority than when the purchaser declares off immediately.

The Lord CHANCELLOR by his observations on the other points in the cause appeared equally clear in favor of his former opinion.

Upon the 8th of August, just as his Lordship was proceeding to give judgment, the parties came to the following terms: the Plaintiffs to take the deposit, which had been paid into Court, and to receive from the Defendant the farther sum of 1300*l.*: the bill to be dismissed without costs; and the contract to be delivered up to be cancelled (*).—[VESEY.

* *Post*, *Bowles v. Round*, vol. v. 506; vi. 336; x. 399. *Smith v. Clarke*, xii. 477. *Meadows v. Tanner*, 5 Madd. 34.

MORLEY v. BIRD.

[ROLLS.—1798, MARCH 1, 5.]

NOTWITHSTANDING the leaning of late to a tenancy in common, an interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance, as "equally, among," &c., or an inference of that sort arises in equity from the nature of the transaction; as in partnerships, a joint mortgage, &c. (a)

Specific legacy of stock decreed according to the value at the time it ought to have been transferred, (b) [p. 629.]

WILLIAM COLLINS by his will gave to his daughter Elizabeth all his freehold houses and land at Newbury and Bath and Weston with all his money in the stocks, mortgages, debts, &c. goods, chattels, "and every thing I die possessed of I give this all to her only use and pleasure for ever on condition that she do pay to the four daughters of my brother John Collins four hundred pounds out of seven now lying in the 3 per cent. Consolidated."

Three of the four daughters of John Collins died in the life of the testator. The surviving daughter Martha in 1790 married [*629] *Thomas Morley. The testator died on the 1st of June, 1793. The bill was filed in June, 1797, by Morley and his wife against William Bird and Elizabeth his wife, the testator's daughter, claiming the whole legacy given to the four daughters of John Collins.

The Defendants by their answer stated, that the Defendant Elizabeth having been advised, that the Plaintiff Martha was only entitled to 100*l.* of the said 700*l.* 3 per cent. annuities, the Defendant Elizabeth from time to time caused to be transferred 600*l.*

(a) Joint tenancy in chattels is very much restricted. It does not apply to stock used in any joint undertaking, either in trade or agriculture: for, according to Mr. Chancellor Kent, the forbidding doctrine of survivorship would tend to damp the spirit and enterprise requisite to conduct the business with success. 2 Kent, Com. 350, (5th ed.) Subject to these exceptions, a gift, or grant of a chattel interest, to two or more persons, creates a joint tenancy; and a joint tenant, it is said, may lawfully dispose of the whole property. *Barton v. Williams*, 5 B. & Ald. 395. See *Wilson v. Reed*, 3 Johns. 175; *Waddell v. Cook*, 2 Hill, 47; *Guillet v. Dossat*, 4 Martin, 203; *Martin v. Smith*, 5 Binn. 16. At one time the Courts are said to have leaned against any construction tending to support a joint tenancy in legacies of chattels; and testators were presumed to have intended to confer legacies in the most advantageous manner. But it has been since established that, where a legacy is given to two or more persons, they will take a joint tenancy, unless the will contains words to show that the testator intended a severance of the interest, and to take away the right of survivorship. 2 Kent, Com. 351.

(b) When a legacy is given out of a particular stock, of which the testator was possessed at the date of the Will, without any thing expressive of the testator's intention, as where the bequest is of "£1000 out of any reserved bank annuities three per cents." the legacy will not be specific; but in the nature of a specific legacy. 2 Williams, Exec. 844. Where a clear intention appears, as in the present case, upon other parts of the Will, that the testator intended to bequeath so much of the identical stock on annuities which he had, the legacy will be considered specific. Ibid.

of such annuities; leaving 100*l.* to answer the Plaintiff's legacy, and which the Defendant offered to transfer and to permit the Plaintiffs to receive the dividends accrued subsequent to the testator's death.

March 1st. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The only point is, whether this legacy is to be considered as a joint legacy, given to the four daughters of Collins as joint-tenants, or whether they were to take 100*l.* each as tenants in common. The first question is, whether the form, in which this legacy is given, makes any difference, from what would be the case, if it was a direct legacy to be paid by the executor. That was contended to take it out of the common case; supposing a joint legacy can take place; that not being a legacy to be paid by the executor, but payable upon a condition, if it is not to be done according to the terms, it is void; and if so, three being dead, and the condition therefore having become impossible, it proves totally void; and would absolve the devisee from the payment of any sum. It is impossible to make the least distinction between a legacy to one person upon condition, to pay to four persons 400*l.* and a legacy of 400*l.* to be paid to them by the executor.

The next question is, whether according to the rules of this Court a legacy of a gross sum given to two or more without any words of severance or distribution is a gift in joint-tenancy to the persons intended to be benefited. That came before me in *Campbell v. Campbell*, 4 Bro. C. C. 15: where the first question was, whether there were sufficient words of severance to make a legacy a tenancy in common; supposing, there could in point of the rules of construction be any such thing as a joint legacy: and I was pressed with *Perkins v. Baynton*, 1 Bro. C. C. 118; in which, it was said, Lord Thurlow had expressed a doubt, whether a legacy is a subject, upon which a joint-tenancy can attach. I remember taking much time, and fully inquiring, whether there was any foundation for that doubt; and the result of that inquiry led me to think, the report of *Perkins v. Baynton* must have been mistaken; and I took notice, that it was not the point before Lord Thurlow; for the question there was merely, whether there was a severance, or not. As the opinions of great Judges given upon points not before them have certainly not so much weight, as when the points are before them, I should on that account have paid the less regard to it: but if I was satisfied, that Lord Thurlow really doubted the point, even though it was not before him, I should have much questioned my own opinion: but I rested my opinion in *Campbell v. Campbell* upon *Cray v. Willis*, 2 P. Wms. 529, which I still conceive a direct authority by a very great Judge, Sir Joseph Jekyll, upon all questions of this nature. He seems to consider, that both residuary and pecuniary legatees must be taken to be joint-tenants, unless there are words of severance, showing an intention to make a tenancy in common; and I cannot suppose, Lord Thurlow threw out that doubt: but I am relieved from difficulty by subsequent cases before

Lord Thurlow, in which he makes no such doubt. In *Jolliffe v. East*, 3 Bro. C. C. 25, he throws out no such doubt: on the contrary he expressly gives his opinion there, that it is a joint-tenancy or a tenancy in common according as there are words of severance or not. The pains, he there takes, would have been thrown away, if he had any such doubt. He had the question before him, whether the legacy of 10,000*l.* was a joint-tenancy or a tenancy in common; and there is not the least hint of his having doubted, whether the subject was capable of a joint-tenancy; and therefore, I believe, he never entertained such a doubt.

Then the question is, whether, if the manner, in which this legacy is given, makes no difference, which it is impossible to suppose, this legacy without any words, which can in any degree be construed a severance, is not a joint interest; and the consequence is, that it is a gift to all or to the survivor, as at law; and the deaths of the three will not vitiate the gift.

I wish to give my opinion very explicitly. Great doubts have been entertained by Judges both at Law and in Equity as to words creating a joint-tenancy or a tenancy in common; and it [*631] is *clear, the ancient law was in favor of a joint-tenancy; and that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint-tenancy, notwithstanding the leaning of the Courts lately in favor of a tenancy in common. A legacy of a specific chattel, a grant of an estate, is a joint-tenancy. It is true, the Courts seeing the inconvenience of that have been desirous, wherever they could find any intention of severance, to avail themselves of it; and their successive determinations have laid hold of any words for that purpose. "Equally to be divided (1), equally, among, between," even in Law I believe, certainly in equity, create a tenancy in common: but without those words it is a joint-tenancy. But many distinctions have been raised in Equity (2); as where persons are in trade, and have joint debts due to them; the Courts say, it could not be intended to the prejudice of the family of the deceased partner; therefore not doubting, that it would be a joint-tenancy at Law, in Equity they say, it could not be the agreement. So if two people join in lending money upon a mortgage, Equity says, it could not be the intention, that the interest in that should survive. Though they take a joint security, each means to lend his own and take back his own. But that was never extended to grants. A voluntary bond would survive, if no intention of the party to make a severance appears. Therefore legacies, gifts, grants, &c. are both at Law and in Equity joint; except from the nature of the contract or from the words some intention of severance appears.

This is a legacy to four persons; and there are no words of severance; therefore it is a joint legacy; and the whole interest sur-

(1) *Rigden v. Vallier*, 2 Ves. 252.

(2) See, *ante*, vol. i. 434, 435; 2 Ves. 258; *post*, *Jackson v. Jackson*, vol. vii. 535; ix. 501; and the note, 597; *Aveling v. Kripe*, xix. 441.

vives to the survivor, three being dead ; and though I agree with those, who think it the least evil, that it should be a tenancy in common, this is one of those cases, in which it is more convenient, that it should remain joint. Sir Joseph Jekyll in *Cray v. Willis* observes the convenience, that a joint-tenancy sometimes has ; that the legacy is not lost. This legacy therefore belongs to the Plaintiffs (1).

It was then contended, that this was a specific legacy ; and the Plaintiffs were entitled to the value of the 300*l.* stock at the end of a year from the testator's death.

The MASTER OF THE ROLLS was of opinion upon reading [632] the will, that it was specific ; observing, that on that account it was more clearly a joint-tenancy ; and upon the 8th of March declared as to the 300*l.* that the Plaintiffs were entitled according to the value of the stock at the end of a year from the death of the testator ; when it ought to have been transferred ; and directed an inquiry to ascertain the value at that time ; and that the remaining 100*l.* should be transferred with the dividends accrued.

THAT where there are no words or circumstances which either expressly or by implication create a severance, legatees must take as joint tenants, is well settled ; *Whitmore v. Trelawney*, 6 Ves. 134 ; *Swaine v. Burton*, 15 Ves. 371 ; *Crooke v. De Vandes*, 9 Ves. 204 ; though the leaning of Courts, in modern times, it has been said, is in favor of tenancy in common. *Rigden v. Vallier*, 2 Ves. Sen. 258 ; and see note 4 to *Perry v. Woods*, 3 V. 204. It is also quite clear, the law of merchants excludes survivorship as to the property embarked in a joint business. *Jackson v. Jackson*, 9 Ves. 596. And when a purchase agreement has been entered into by two purchasers, in terms *prima facie* joint, but there are circumstances from which it can be collected, that a joint tenancy was not in contemplation, a Court of Equity will not execute the agreement by a conveyance in joint tenancy ; the intention, however, to make the purchase as tenants in common will not be assumed as of necessity. *Aveling v. Knipe*, 19 Ves. 444. If two persons advance money on a mortgage, though the mortgage deed may be joint, yet the interest will not be subject to a survivorship, when the intention of the lenders was that each should receive his own money again. *Petty v. Staynard*, 1 Cha. Rep. 58.

STUART v. BRUCE.

[1798, MAY 9.]

REQUEST to two without words of severance : they take jointly. (a)

CHARLES STUART, late of Bombay, being possessed of a considerable personal estate, and being about to depart from Bombay on a military expedition, by his will dated the 29th December, 1782, made the following disposition :

“ *Imprimis* I entreat and request, that Patrick Craufurd Bruce and

(1) See the next case, and *Crooke v. De Vande*, *post*, vol. ix. 197.

(a) See note (a) to the preceding case.

Philip Samuel Maister of Bombay be executors of this my last will and testament. I do constitute and appoint my daughter and son born of my servant Champy to be my sole heirs and executors to my estate movable and immovable after payment of all my just and lawful debts. *Item* as the present service I am now going upon requires my immediate departure, and prevents my having the above children baptized, it is my request to my executors, that in case of any accident to me, that they perform that duty by naming the daughter Charlotte and the son Patrick Craufurd Bruce; and that in case the said mother should prove again with child, it is my pleasure, that the whole of my estate be divided equally between the mother and the children."

The testator died at Bednore in the East Indies in May 1783. His son and daughter were baptized agreeably to his request, and were his only children living at his decease. Their mother died without having any other child. Patrick Craufurd Bruce the son died at Bombay in 1784, an infant, intestate, and without issue. The bill was filed by the daughter, claiming the whole of the testator's property, against the executor Bruce, and Alexander Duncan, who took out letters of administration to the son, and received from the executor a considerable part of the property, and against the Attorney General.

[*633] * Mr. Grant, for the Plaintiff cited *Shore v. Billingsley*, 1 Vern. 482. Sir T. Jones, 162. *Webster v. Webster*, *Cray v. Willis*, 2 P. W. 347, 529, and *Willing v. Baine*, 3 P. W. 113, against the *dictum* imputed to Lord Thurlow in *Perkins v. Baynton*, 1 Bro. C. C. 118.

Attorney General [Sir John Scott], for the Defendants. Having occasion formerly to examine the ground of that *dictum* I found by the Register's Book, that Vernon's report of *Shore v. Billingsley* is right. The report does not say, whether they were executors, or not; and I looked into the original will in the Commons; by which it appears, they were mere residuary legatees. That case therefore is a direct authority against the *dictum* imputed to Lord Thurlow. The other cases, that have been cited, are also directly against it. I cannot therefore dispute, that this is a joint-tenancy.

Lord CHANCELLOR [LOUGHBOROUGH] held it clearly joint; and observed, that, as they were natural children, and could not succeed to each other, that circumstance was a strong inducement to leave it to them jointly, if the testator had consulted how to leave it to them in the best way.

SEE the early part of the note to the last case, and the references there given.

ATTORNEY GENERAL v. ANDREW.

[1797, DEC. 6, 7. 1798, FEB. 10; MARCH 1, 5.]

A COLLEGE, devisee in remainder, after estates for lives, in trust for purposes partly for their own benefit, and very specific with respect to them, held not to have accepted the devise by acts done merely to preserve the fund; and refusing to accept after the death of the tenants for life, the Master was directed to receive a proposal, in order to have it determined, whether it could be executed *cy pres*. (a)

JOHN ANDREW, Doctor of Laws, by his will, dated the 15th of May, 1747, and duly executed, among other things, in order to make a secure and suitable provision for his relations, relying upon the justice, care, and integrity, of the Society hereafter mentioned, directed, that, as soon as a suitable purchase of freehold estates in land might be met with, all his 3 per cent. Annuities in the Bank of England should be sold and invested therein, and settled to the following uses: that is, that the rents and profits thereof should be paid half-yearly to his sisters, Anne Andrew, Elizabeth Woodward, Bridget Andrew, and Lois Andrew, share and share alike, during their joint lives, and to the survivors and survivor of them; and after the death of the last survivor then to the use of the College or Hall of the Holy and Undivided Trinity in the University of Cambridge; and that the said lands should be vested in said College; which by license of mortmain *they were enabled to take; and he [*634] directed that four new Scholarships should be then founded: the scholars to be chosen to be such as should have been educated at Merchant Tailors' School, London; who should have been

(a) As to the jurisdiction of Equity over charities; 2 Story, Eq. Jur. § 1137-1164; and particularly as to the doctrine of *cy pres*. Ibid, 1169, 1170, 1176, 1177. See, ante, note (a) to *Attorney General v. Tanner*, 2 V. 1; and post, p. 714, note (a) to *Attorney General v. Bowyer*; 2 Kent, Com. 285-288; 4 ib. 508, 509; *Orphan Asylum v. M'Cartee*, 9 Cowen, 437; *Baptist Association v. Hart*, 4 Wheat. 1; S. C. 3 Peters, 481; *Whitman v. Lee*, 17 S. & R. 88; *Moore v. Moore*, 4 Dana, 357; *Drushell v. Attorney General*, 5 Harr. & J. 392; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Peters, 99; *Bartlett v. Nye*, 4 Metc. 378; *Trustees of McIntyre Poor School v. Zanesville C. & M. Co.* 9 Ohio, 203. The doctrine of *cy pres* does not prevail in North Carolina; and if the intention of the testator, in respect to a charity for religious purposes, cannot be literally fulfilled, a trust results for the heir, or next of kin, as the case may be. *M'Auley v. Wilson*, 1 Bad. & Dev. Eq. 276. The doctrine of the English Chancery is much broader than any that has been inculcated in America. If a bequest be for charity, it matters not how uncertain the objects or persons may be; or whether the bequest can be carried into exact execution or not; or whether the persons who are to take are in *esse* or not; or whether the legatee be a corporation capable in law to take or not. In all these, and the like cases, the court will sustain the legacy, and give it effect according to its own principles. Where a literal execution becomes inexpedient or impracticable, the court will execute it *cy pres*. 4 Kent, Com. 509, note. The doctrine of *cy pres* as applied to charities was formerly pushed to a most extravagant length. See 2 Story, Eq. Jur. § 1176, and cases cited; *Attorney General v. Ironmongers' Co.* 2 Mylne & K. 576; S. C. 1 Craig & Phillips, 220; S. C. 2 Beavan, 313; *Attorney General v. Coopers' Co.* 3 Beavan, 29; *Attorney General v. Drapers' Co.* 2 Beavan, 508. As to the suspension of the acceptance of the trust, see post, p. 650, Hovenden's note to the present case.

in the bench or table of said school ; who besides the usual allowance and payments made to the other scholars of said house should receive 5*l.* quarterly from the Bursar ; and the remainder of the rents, issues, and profits, of said estates, as the same should come in, to be put out at interest upon Government or other public securities, until there should be raised the sum of 20,000*l.* to be laid out in additional buildings to said College, either according to the plan then already made, or such other as the Society might think more convenient ; and he directed, that so soon as the said 3 per cent. Annuities should be vested in land, the account might be made yearly of the several receipts and payments, in the same manner as the Causeway account was then kept, and at the same time ; and that the Master for the time being should be allowed out of the rents and profits of the said estates 5*l.* ; the Bursar like 5*l.* ; and each Fellow, who should be present at the making up said account, 20*s.* ; and the Bursar to be allowed a salary of 20*l.* per annum for his trouble in receiving and paying the rents and profits to the testator's sisters punctually according to the directions of the will ; and after the said sum of 20,000*l.* should be raised for the building, the testator directed, that four new Fellowships should be erected, and added to the then present number, upon the same footing, and subject to the same rules and statutes, and with the same provisions, allowances, and privileges, in all things as the other Civil Law Fellowships ; and to be chosen and appointed in the same manner ; saving, that no person should be qualified, or capable of being chosen or appointed by lapse to any of the said Fellowships, unless he should have been educated at Merchant Tailors' School, and should have been in the bench or table of the said school, if any may be found fitly qualified in either of the Universities of Cambridge or Oxford : those, who are or have been scholars of the house of the said College, first to be preferred, if fit ; and when the said Fellowships shall be added, the said account to be discontinued and cease ; and the rents, issues, and profits of the said estates to be applied to the general use of the said College ; but the salary of 20*l.* per annum to be continued to the Bursar ; and 10*l.* per annum to be added to the salary of the Law Lecturer.

[* 635] * The testator directed, that until a proper purchase could be met with, the aforesaid 3 per cent. Annuities should be and remain in the same fund, and the interest and dividends thereof be received by his executrix for the use of herself and her aforesaid sisters and the survivors and survivor of them share and share alike ; and he desired his worthy friends Dr. Simpson, Master of the said College, and Dr. Charles Pinfold, Jun. would be pleased to assist his executrix in purchasing the said estates with the approbation of the said College ; that the same might be settled according to his will : so that his sisters might receive the income thereof punctually and without trouble ; and he gave to each of them 100*l.* ; and in case any loss should happen, he directed, that his executrix should in nowise be answerable for it : the charge of the pur-

chase or otherwise arising from settling the same to be paid out of the principal and not out of the interest or dividends of the said 3 per cent Annuities. He gave to his brother, the Reverend William Andrew, 1000*l.* Bank Stock ; and to his daughters Sarah and Thomazine 1000*l.* Bank Stock a-piece. He likewise gave to his brother, his executors and administrators, the interest of 1050*l.* lent upon the Huntingdon and Cambridge turnpike, to be applied for the use and maintenance of his son John Andrew during his natural life, in such manner as his said brother should appoint ; and in case the same should be paid off, to be placed out again at interest upon Government or other public security : and after the death of John Andrew he gave the said principal sum of 1050*l.* to the Master, Fellows, and Scholars, of Trinity Hall aforesaid, to be laid out in lands for the use of the said society towards the better enabling them to support the additional Scholarships and Fellowships ; and until the same should be erected, the income and profits thereof to be made part of the fund intended for the additional buildings, and to be entered in the account before directed to be kept. He gave to the College the farther sum of 100*l.* and a specific legacy of plate, and he gave the residue of his personal estate and effects not before disposed of to Lois Andrew ; and appointed her sole executrix.

By a codicil of the same date with his will the testator directed, that in case his sister Bridget should survive his sisters Woodward and Lois, as her health would not permit her to enjoy what he had given her, the College do pay her 200*l.* per annum clear of all deductions ; and that the remainder of his 3 per cents. and India * Stock be applied to the account towards the additional buildings, or the profits of the estates purchased therewith ; and taking notice, that since the writing of his will and before the execution thereof it had pleased God to take to himself his sister Anne Andrew, he directed that the 1000*l.* East India Stock thereby given to her be added to his 3 per cent. Annuities, and to the uses in the same manner and form and to all the same intents and purposes whatsoever as they were directed to be settled and enjoyed. [*636]

The testator died soon after the execution of the will without leaving any issue. Bridget Andrew, Elizabeth Woodward, Lois Andrew, and John Andrew, survived him. At the time of making his will and at his death he was possessed of 500*l.* Bank Stock, 17,200*l.* 3 per cent. Bank Consolidated Annuities, 1000*l.* reduced Bank Annuities of 1726, 1000*l.* East India Stock, and 1056*l.* due to him upon the said turnpike security, and other personal estate. The funds having never been laid out in land, and Bridget Andrew, Elizabeth Woodward, and Lois Andrew, being all dead, the latter, who was the survivor, having died in 1793, the information was filed at the relation of the Master and Wardens of the Merchant Tailor's School against the Master, Fellows, and Scholars, of Trinity Hall and James Andrew, executor of Lois Andrew, and heir at law of the testator, praying, that the trusts of the will may be performed ;

and that the Master, Fellows, and Scholars, of Trinity Hall may be decreed to accept the trust; and in case the Court shall be of opinion, that they are not bound to accept it, that the funds may be laid out and disposed of under the decree of the Court for the benefit of Merchant Tailors' School and the Scholars educated at the same, in such manner as the Court shall be of opinion will most nearly correspond with and effectuate the charitable designs of the testator in his will and codicil.

The College by their answer stated, that since the filing of the information they have been informed and believe, that by a deed poll under the common seal of the College, dated the 17th of May, 1755, after reciting the will and codicil, the death of the testator, and the probate by Lois Andrew, and that the testator was at the time of his decease possessed of the said sums of 17,200*l.* 3 per cent. Consolidated Bank Annuities, 1000*l.* 3 per cent. Bank Annuities of 1726, 500*l.* Bank Stock and 1000*l.* East India Stock; and that at the request of the then Master, Fellows, and Scholars, of the said College Lois Andrew had agreed to *transfer to the then Master, &c. and to her, the said Lois Andrew, the said funds, in trust, that Elizabeth Woodward and Lois Andrew might during their respective lives and the life of the longer liver of them receive all interest and dividends of said Bank Annuities and East India Stock; and if Bridget Andrew should survive them, then upon trust, that from the decease of the survivor of Elizabeth Woodward and Lois Andrew 200*l.* clear of all taxes and deduction might be secured and paid for the benefit of Bridget Andrew in such manner as thereafter is mentioned; and that William Andrew might receive the dividends of said 500*l.* Bank Stock during his life; and subject thereto that said several stocks and the rest of the dividends thereof should go and be applied to and for such uses, intents, and purposes, as the same were directed to be applied in and by the said will, the said then Master, Fellows, &c. did therefore acknowledge and declare, that the said 17,200*l.*, &c. so agreed to be transferred, as aforesaid, were all the Bank Annuities, Bank Stock, and East India Stock, which the testator was possessed of at his decease, and which were bequeathed unto them the said Master, &c. in and by the said will and codicil, and which were required and intended to be transferred by Lois Andrew, as aforesaid, for the uses and purposes intended concerning the same in and by the said will and codicil: and the said then Master, &c. of the said College did thereby for themselves and their successors covenant and agree with Elizabeth Woodward and Lois Andrew and the survivor of them, their executors, &c. that they and the survivor should from thenceforth during their respective lives and the life of the longer liver of them have and receive to and for their own use and uses all the dividends and interest, which should become due during the lives of Elizabeth Woodward and Lois Andrew and the survivor on the said Bank Annuities, Bank Stock and East India Stock, or the rents and profits of all lands and tenements, which

should be purchased with the produce of said stocks; and the said then Master, &c. also covenanted for themselves and their successors with Lois Andrew, her executors, &c. that if Bridget Andrew should survive Elizabeth Woodward and Lois Andrew, the said Master, &c. or their successors, would from thenceforth during the life of Bridget Andrew pay for her use and benefit during her life to the executors or administrators of Lois Andrew, or such person or persons, and in such manner as she by her will or any writing signed by her in the presence of two or more credible witnesses should direct or appoint, out of the dividends and interest of the said Bank * Annuities, Bank Stock, and East India Stock, [*638] or the rents and profits of the lands, which should be purchased with the produce of the said stocks, the yearly sum of 200*l.* clear of all deductions; and that the said Master, &c. would pay to William Andrew during his life the dividends of the said 500*l.* Bank Stock, when and as the same should from time to time become due.

The funds were transferred accordingly; and continued to stand in the names of the Master, Fellows, and Scholars of the College and of Lois Andrew; and the dividends of the Bank Annuities and East India Stock were from time to time, as they became due, paid to Elizabeth Woodward and Lois Andrew and the survivor during their respective lives; and the dividends of the Bank Stock to William Andrew. The sum of 1050*l.* continued due upon the turnpike security. John Andrew died in 1764; and William Andrew in 1792. The Defendants, the Master, &c. of the College, stated, that since the death of Lois Andrew and William Andrew none of the interest and dividends of the Bank and East India Stock were received by them, or to their knowledge by any of their predecessors: but they admitted, that they had received from the trustees of the turnpike security all the interest due thereon since the death of John Andrew to Midsummer 1794. They also admitted, that they decline to act in the trusts of the will, and desire to renounce the trust and refuse the bequests to them by the will and codicil upon the trusts therein mentioned, because upon mature consideration they are satisfied they cannot accept such trusts and execute the same without doing very great prejudice to their said College and the establishment thereof; and they submitted, that the acts before mentioned ought not to be considered as done in performance of the trusts and do not amount to an acceptance thereof; and in December 1793, they gave notice to the relators and James Andrew of their intention to renounce.

The answer of James Andrew also stated the deed of 1755; which was in his possession.

Attorney General [Sir John Scott], Mr. Graham, and Mr. Stanley, for the Information. The acts of the College amount to a clear acceptance. The respective tenants for life received the dividends under the College; and since the death of John Andrew they received the interest of the money due upon the turnpike

security themselves. This is a very important question; for if the Defendants can now renounce the trust, any College may say, they will no longer execute their trust, upon the same general ground, that it will be prejudicial to the interest of the College. *Attorney General v. Christ's Hospital*, 3 Bro. C. C. 165. There can be little doubt, that the legacies of 100*l.* and of the plate were accepted.

Solicitor General [Sir John Mitford], Mr. Mansfield, and Mr. Richards, for the College. A body of this description are to a certain degree in the nature of trustees; and the acts of their predecessors cannot compel them to be guilty of a breach of trust. These new scholars are to be provided for, not out the testator's funds simply, but out of the funds appropriated to the other scholars. By what authority can they be guilty of such a breach of their engagements with the other founders? The funds were transferred without any view of the subject, for any thing that appears. What passed on the occasion does not appear. There is no trace in the books of the College upon the subject. This instrument was in the possession of the family; and was not known to the College before the answer of James Andrew to the information. The interest the College received upon the turnpike security was carried to a separate account. Very different acts would be necessary to bind them. To found new Scholarships and Fellowships they must do a solemn act to make them part of the foundation; and I apprehend, some concurrence of the Visitor would be necessary. All such acts to make a new constitution are registered; and a very solemn act is always done. By the statutes of foundation new Fellows are to be accepted "*de communi omnium consilio & assensu.*" The seal of the College is no evidence of that. The different foundations are by very formal instruments: "*nos,*" &c. "*& omnes socii attendentes statuimus & ordinamus,*" &c.; and there are solemn entries in the books. In this case even a common person would not be bound in equity. In *The Duke of Montague v. Lord Beaulieu*, 6 Bro. P. C. 231. 1*b.* 7, 303, notwithstanding the strong acts done, yet as the subject had not come clearly under the consideration of the party, and there was no distinct agreement to perform the condition, it could not be compelled. There are many other cases, where parties have been held not bound even after having received great benefits. This [*640] *is going a great way farther; attending to the rule of the Court as to election, very clearly laid down in *Boynton v. Boynton*, 1 Bro. C. C. 445 (1). The case of Christ's Hospital was not a foundation of any new establishment: but there had been a misconstruction of the intention. They were perfectly competent to do what was directed. It had nothing to do with their actual establishment. The question was merely, whether the meaning of the testator was, to impose a condition upon the Hospital to take six children from the parish, or that they should take six, in case the

(1) *Wake v. Wake*, 3 Bro. C. C. 255; *ante*, vol. i. 335, and the note, 337.

rents and profits according to the usual application would maintain six. They had upon their construction educated only three. At the time of the information the produce was equal to maintain six. The information insisted upon a retrospect; which the Court did not grant; and it ended simply in a declaration, that they ought to receive six at the nomination of the Churchwardens and Overseers of that particular parish. The decree sought in this case is quite different. It is to make an addition to the establishment, not to proceed upon the footing of the ancient establishment; and that new establishment is to have the effect of communicating to the objects of it all the advantage of the old. In this case a simple acceptance would not bind the successors. There must have been a formal incorporation. Nothing is more inconvenient to a College than to be bound to take members from a particular school. No person has been injured by what the College has done; nor have they received any benefit. The object could not be enforced with any effect till this time on account of the tenants for life. What do these acts amount to but the preservation of the funds? They cannot be bound by the general expressions in the deed, "at the request of the College," &c.; which are mere words of course.

Mr. *Lloyd*, Mr. *King*, and Mr. *Wear*, for the next of Kin, contended, that if the College were not bound, the object being distinctly marked out and defined, the Court had no power to supply any other.

Reply. The College received the interest upon the turnpike security for thirty years, subject to no trust under that deed but the general charitable purpose. If any thing turns upon the *instances of foundation alluded to, there ought to be an [*641] inquiry into the power of the College to receive an accession of Fellows, and the particular circumstances of this deed. They possess themselves of the fund, enter into covenants, give a release to the executrix, and authorize the executrix to say, these are the only funds applicable to this purpose. Did they mean to take the trust upon them merely for the benefit of these persons for life and then for the next of kin? By their declaration, that these were all the funds bequeathed to them, &c. they mean, that these were all the securities, the testator had made the capital of a charitable fund; and the deed refers to all the purposes of the will. It is very difficult to distinguish this from the case of Christ's Hospital. The Master's report there stated, that though the funds were then sufficient, they probably would not be long so: but still the Lord Chancellor said, they were capable of accepting, and had accepted.

Feb. 10th. LORD CHANCELLOR [LOUGHBOROUGH]. I had directed this cause to be set down for judgment; having formed my own conclusion upon it; that the College had done nothing to conclude them as an acceptance of the bequest. They put themselves in the trust of the money; but no farther. But I have considerable doubt, what will be the consequence of that; which was not discussed so much as it ought to be. My opinion turns upon this: I have no right to

force them to take it. They have done no act, that can conclude themselves. Upon the deed poll and the other proceedings nothing more was intended than merely to secure the property; saving to the representatives of Dr. Andrew what would have been the expense of the suit, if they had declined putting the funds under the care of the College. Then the idea, that I took up, perhaps a little hastily, was, that, if the College refused, the will was void. That is not quite clear; because, being to a College, the statute of Mortmain does not affect it; then it is a bequest to a given purpose; which purpose cannot take effect; and what will be the consequence of a thing so bequeathed I am not quite prepared to say: whether there can be any mode of executing it *cy pres*: or whether, if there is no use, that I can execute, I must give it to the representatives.

Upon the 1st of March, 1798, this cause was again argued upon the whole case: the following entries having been in the [* 642] interval *since the former argument discovered in a manuscript book of the College, entitled "Lease Book" beginning 1735 and ending in 1768.

Letter of attorney from the Master, Fellows, and Scholars of Trinity Hall Cambridge to Lois Andrew and Elizabeth Woodward to receive dividends of the 3 per cent. Bank Annuities following; of which John Andrew Doctor of Laws was possessed at his death: that is to say; 1000*l.* Bank Annuities 1726: 1000*l.* Bank Annuities 1731: 1400*l.* Bank Annuities 1742: 1500*l.* Bank Annuities 1743: 8200*l.* Bank Annuities 1744: and 5100*l.* Bank Annuities 1745: all which the said Lois Andrew, the sole executrix of the said John Andrew, hath agreed to transfer to the said Master, &c. of Trinity Hall, to the intent, that the same may be secured for the uses intended by the will of the said John Andrew, upon their undertaking to empower the said Lois Andrew and Elizabeth Woodward and the survivor of them for the purposes contained in the said will—dated 18th January, 1750.

Letter of attorney from the Master, &c. to Lois Andrew and Elizabeth Woodward to receive dividends upon 1000*l.* East India Stock, late the property of Dr. John Andrew; which Lois Andrew, his executrix, had also agreed to transfer to the said Master—dated 18th January, 1750.

Letter of attorney from the Master, &c. to Mr. William Andrew to receive dividends upon 500*l.* Bank Stock, late the property of Dr. John Andrew; which Lois Andrew had agreed to transfer to the said Master, &c.—dated 18th January, 1750.

Letter of attorney from the Master, &c. to accept for us and in our names the several sums of 3 per cent. Bank Annuities mentioned in the aforesaid letter of attorney to Lois Andrew and Elizabeth Woodward, to be transferred to us by Lois Andrew the executrix of John Andrew, deceased—dated 21st January, 1750.

Two similar letters of attorney of the same date from the Master, &c. to accept 1000*l.* India Stock and 500*l.* Bank Stock.

Letter of attorney from the Master, &c. to Edward Simpson and Charles Pinfold, Doctors of Law, for us and in our names to accept all such transfers as may be made to us at any time hereafter of any interest in the capital stock of 3 per cent. Annuities created by the act of 25 Geo II. jointly with Lois Andrew of, &c.—dated 23d July, 1753.

* Three similar letters of attorney of the same date to [*643] accept 1000*l.* East India Stock ; 500*l.* Bank Stock ; and 1000*l.* Million Lottery Stock.

Letter of Attorney from the Master, &c. to Lois Andrew and Elizabeth Woodward to receive the dividends of 17,200*l.* 3 per cent. Annuities ; which are to be transferred by the said Lois Andrew, as executrix of John Andrew, into the joint names of us the said Master, &c. and Lois Andrew—dated 7th January, 1755.

The deed-poll and declaration of trust of the several Government Stocks, 17th May, 1755, already produced.

Letter of attorney, to the like effect as the three last-mentioned, from the Master, &c. to William Andrew to receive dividends upon 500*l.* Bank Stock—dated 17th May, 1776.

Letter of attorney from the Master, &c. under their common seal, to Godfrey Lee Farrant jointly with Lois Andrew to accept a transfer, which would be made unto said Master, &c. jointly with Lois Andrew by said Lois Andrew, as sole executrix of the will of John Andrew, from the account of the said John Andrew of 17,200*l.* 3 per cent. Bank Annuities—dated 7th April, 1756.

Three similar letters of attorney of the same date to accept transfers of the 1000*l.* 3 per cent. Bank Annuities 1726 ; 500*l.* Bank Stock ; and 1000*l.* East India Stock.

Letter of attorney from the Master, &c. under their common seal, to Lois Andrew and Elizabeth Woodward to receive the dividends upon the 17,200*l.* 3 per cent. Bank Annuities ; which would at some time hence be transferred unto said Master, &c. and Lois Andrew jointly by Lois Andrew, as executrix, &c.—dated 7th April, 1756.

Letter of attorney of the same date from the Master, &c. and Lois Andrew to Elizabeth Woodward to receive the dividends of the 1000*l.* 3 per cent. Bank Annuities 1726 ; and to William Andrew to receive the dividends upon the 500*l.* Bank Stock.

Upon these entries it was again strongly contended for the relators, that the College was bound. On the other hand it was insisted, that they did not vary the case.

* Upon the other point:

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For the Information. The question is, whether, devises to Colleges being excepted by the Statute, the Court can give it to any other College that will accept it : and apply it as near as may be to the purposes of the charity. There are many cases, in which personal funds being given so attached to purposes not legal within the Statute, questions of this kind have been decided in favor of the next of kin : that is, wherever the doctrine of *cy pres* has been

pressed, the Court have thought, they must find in the will a general intention for charity predominant over the particular charity: but they have uniformly said, that if a personal fund is so given, that a particular purpose is specifically pointed at, as the purpose the testator wishes to effectuate, the Court will not seek for another purpose. Is the intention so specific with respect to Trinity College, that in executing it the Court must hold, that his purpose would fail, if this is given to any other College? In arguing, that his purpose would not fail, there is great difficulty from the particular benefits to the Bursar and others, and the large sum of 20,000*l.* for additional buildings to that College. It is difficult to apply those to other Colleges: but there is this difference between this case and those alluded to: in this the particular purpose of the testator is not illegal; but fails, because the trustees will not execute the trust. In the case of *Wheatley Church* (1), and many others, the particular purpose was illegal; and the Court said they could not detach the application from that illegal purpose, and apply it to some other purpose, that is legal. Here the caprice of the trustees steps in between the legal intention and the execution of it. May not this be compared to cases, where the testator gives his property to such charitable uses as the trustees shall appoint? though he means their discretion to point out the specific charity, yet if they died in his life, as in *Moggridge v. Thackwell*, 3 Bro. C. C. 517, (*ante*, Vol. I. 464), or would not act, and therefore the particular purpose could not be carried into execution, the Court would say, the charity would not fail: but the testator's purpose being, that there should be a charity, if the trustees refusing to act pointed to a particular charity, as the last, that, if they did act, they would choose, the Court if they saw it beneficial would apply the fund to that. So in

a case, that frequently occurs; where a testator gives personal property to such *charity or hospital, as his executor shall name; and makes no executor: the gift is incomplete, not because it is illegal, but because he has not supplied the means of carrying into execution the gift, which is legal. *Attorney General v. Boulton*, *ante*, 220, Vol. II. 380; *Attorney General v. Whitchurch*, *ante*, 141.

For the next of kin. The doctrine of *cy pres* as applied to charities, which was formerly carried to a great length, as in *Baxter's Case*, 2 Vern. 248, and *De Costa v. De Pas*, Amb. 228, has been much shaken by the late cases: *Attorney General v. Bishop of Oxford*, 1 Bro. C. C. 444, n.; *Attorney General v. Goulding*, 2 Bro. C. C. 428. That case, though doubted by the Master of the Rolls in the *Attorney General v. Boulton*, was fully established by him upon a review of all the cases in the *Attorney General v. Whitchurch*. The ground of this doctrine must be, that the Court is perfectly satisfied, that by those means they would execute the intention as

(1) *Attorney General v. Bishop of Oxford*, 1 Bro. C. C. 444, n. cited *ante*, vol. ii. 388. See this case stated from the Register's Book, *post*, iv. 431, *Corbyn v. French*.

nearly as possible. Here the intention is too precise. By applying this to another College the Court may act contrary to it. They must be convinced beyond all doubt, that if this failed, he would have given it to another College.

Reply. All the cases, with a very few exceptions, are, that upon the doctrine of *cy pres* as to charities you may substitute one general legal intention for a particular illegal intention ; but you shall not substitute one particular legal intention in the place of a particular illegal intention expressed. The subject is very well discussed by the Master of the Rolls in *Attorney General v. Boulbee*. A decree adding four Fellows and Four Scholars, and limiting them to the produce of this estate, would be good upon all the cases of *cy pres* ; and would be much nearer the intention than giving it to another College. If where the testator has imperfectly expressed his intention as to the mode, in which the charity is to be constituted, the Court will find a mode, why not, where the mode, with regard to which he has expressed his intention, fails? *The Attorney General v. The Bishop of Oxford*, though hardly a decision, does raise some difficulty. If the testator can be taken to mean only to build a church, and not repair the chapel, to build a church at Wheatley upon the site of the chapel only, it must be so: but I cannot believe that to be his intention. It can only amount to this; that it is a case, in which the Court was of opinion, the intention was to do one thing and to negative every thing else.

*Lord CHANCELLOR [LOUGHBOROUGH]. I take it to be [*646] only the note of what Lord Kenyon might have said in answer to the proposal to augment the living: which perhaps might have been a wiser thing than making a larger church: but it was not the testator's idea. It is impossible to suppose, he meant the church to be built directly over the chapel, to include it.

I may modify the objection by permitting even fewer persons, than the testator has proposed, to be brought in. If not, the testator must be taken to have meant the benefit of a College; and, rather than the charity should fail, I must try, if there is not another College, that would become the trustee upon the terms proposed.

I feel no difficulty with regard to the proposition, that the College was competent to accept, to refuse, or to suspend their decision either to accept or refuse. The first question under the circumstances for me to consider is, whether any act has been done, that is a positive acceptance, and such as ought to bind them, and such as deprives them of the power at any given time or under any given circumstances to retract that acceptance. I am bound to put this construction upon the deed of 1755 upon what passed after the death of Doctor Andrew; that they meant by that neither to accept nor positively to refuse; and they have done nothing by it, upon which by any fair and honorable construction of the transactions between them and the next of kin, the only persons with whom they were dealing, I should deem them decidedly to have accepted the benefits, and therefore to have bound themselves to perform the duty, which

would follow upon the acceptance of the benefits, the testator intended to the College. In the first view of it and soon after the death of the testator there was an intention, never carried into act, upon the part of the College to have at once accepted; to have taken possession of the funds; and if they had done so, they must have taken upon them the duty. From the several acts, the letters of attorney, an express deliberate purpose appears. They have gone all the length except the final execution to have invested themselves with all the fund. One cannot but by conjecture imagine what interfered, *that arrested that intention, they had conceived; but after deliberate consideration the deed of 1755 was executed; by which nothing was done but this: for the preservation of the fund, for preventing an immediate suit as to the application, and to have brought on a decision upon the effect of the bequest, they joined themselves with the executrix *qua* trustees of the several funds directed to be applied. By these means any dilapidation and accident to the fund was for the time prevented. They engage, and properly engage, that the dividends should be applied according to the will to the full extent of those dividends. They covenant, and properly, with regard to Bridget's interest, (to whom it was the same, whether it continued money, or was laid out in land, for she was to have 200*l.* a-year) that, be the condition of the fund what it may, she shall have that sum; and there is a general reference to the will; that the funds are to stand in their names and that of the executrix generally upon the trusts of the will. Ought I to infer from this, that they had decided to take the benefit of this bequest, and in consequence of that decision to execute the purposes of the will? Their conduct in that view of it would expose them to a considerable degree of reproach; because they were upon that supposition guilty in collusion with the next of kin of conduct tending to defeat *pro tanto* the execution of the will, and make to a very substantial effect a different destination of the property of Dr. Andrew; and you will see immediately, when I state it, what a difference it would make as to the final disposition. Supposing them to have frankly accepted, their duty was to have done, what this Court would inevitably have directed, to have sold the stock, to have found out a purchase, and to have invested the fund in a purchase of land. The rents and profits would have gone to the relations of the testator during their lives. The effect would have been, that they would have sold all the funds at *par*, or rather above *par*: they would have bought land at 24 or 25 years' purchase. Instead of that, the fund remaining stock, the whole dividends were received by the persons entitled for life. They have received one fifth more, than the testator intended, by collusion with the executrix and the persons, who conducted this affair on behalf of the College. To say the best, it is an unhandsome supposition: but it is a supposition, I am not entitled to make; for it is such a way of dealing with the will, that I would neither suffer a devisee nor a trustee to practice: but they placed themselves in that neutral state; no

person calling upon them to make an option. Perhaps to call upon them immediately would have been more, than the Court would have done under these circumstances, at that period; when there were no ready money funds, no actual estate. I doubt much, whether the Court would have called upon them at that moment to decide, whether they would accept. Perhaps the Court would have sold the stock, and would have directed an account, and cleared the fund; reserving the question as to the election to be considered under the existing circumstances, when the fund was cleared; for the circumstances, under which the College might have then found themselves, would have made a material ingredient, to which the Court would have been bound to give some attention. Therefore I cannot hold, that they have made an absolute, definitive, election to accept this trust: but undoubtedly they accepted the administration of the property; and are accountable for all, that came to their hands: but I go a little farther; for I think, while all things remained embarrassed, it would have been much too strong for the Court to have said, there was not room for the present members to review the decision, their predecessors had made, and to desire not to be compelled to abide by it. It is an infinitely more favorable case than that of the Duke of Montague. The acts done have been a prejudice to nobody. No injury has been done to any person. There is no ground therefore, upon which I can, as applying myself to the consciences of the Gentlemen of the College, controlling their judgment, state to them, that, whatever may be their opinion upon the inconvenience of it to the College, they are bound in conscience to put themselves to the inconvenience, and the College under what they conceive a disadvantage, upon the acts done so many years ago by their predecessors. Their answer in conscience is, here are all the funds: what interest we have received here is an account of: it will go into the fund: but we desire to stand clear of any disposition to be made by the intention of Dr. Andrew; thinking, they did not mean to bind themselves; but that their whole acts amount only to this; that they took a step engaging themselves to nothing but to act fairly and honestly as trustees with regard to the trust fund.

As to the other part of the case, it is not fit to decide upon it without giving an opportunity to state any proposal with regard to this charity. I have not looked at all the cases referred to. * Some of the cases seem to have gone the length of [* 649] raising an idea, that the doctrine of *cy pres* as to a charity ought never again to be mentioned in this Court. I am not quite clear of that.

This case, the devise being for a College, is quite clear of the Mortmain Act. It is not affected at all by it. The purpose of the testator is clearly out of the provision of the statute. Its being to be laid out in land makes no difference. It does not fail either from any imputation, that can be cast upon the intention of the testator; for he was not devising any folly, impracticable in itself. All could

be done, if the College would have accepted it. The execution of his purpose for a charity directed to a course of education is frustrated by events contingent and quite independent of the purpose; as if the trustees, according to whose discretion a charity was to be adopted, had died. It is fit to see, what sort of proposal can be stated upon it. It would come near the purpose, if Trinity Hall would not admit them as Fellows, but were willing to let them stand as Exhibitors. That would be near the purpose of the intention. I do not know, that it would wander very widely from the intention, if any other College was disposed to receive Fellows so well endowed as these Fellows probably will be. What I proposed to do was to dismiss the information, so far as it prays, that the College may be bound by the directions of the will with regard to the establishment of laying out the money upon buildings, and providing for the addition of four Scholars to be Fellows; to direct an account of the money received by the College; to direct the College to transfer the stocks: the turnpike security still remaining out, the bond to be deposited with the Master; and the interest in arrear upon it received by the College to be paid in: all parties to have their costs out of the estate; reserving farther considerations until after the Master shall have made his report; directing him to receive any proposal made to him on the part of Merchant Tailors' School for the establishment of a charity within the terms of the will of Dr. Andrew.

If they can find the means to lay a proposal of an establishment with regard to the four Scholars, such number of Scholars as [* 650] they think that school will afford, I should wish to have *a particular object for my consideration, whether that object is so near the intention, that I can execute it.

The decree was drawn up accordingly (1).

[The matters in judgment in this case arose afterwards in *Andrew v. The Master and Wardens of the Merchant Tailors' Co.* 7 V. 223, and in *Andrew v. Trinity Hall*, Cambridge, 9 V. 525; and the present note refers to all these.]

1. THE devisees of an estate to be held on trust for charitable purposes may suspend, for a reasonable time, their acceptance, or refusal, of such trust; and any intermediate acts, done merely for the preservation of the subject of devise, will not bind them to a conclusive acceptance. But when possession of an estate, given subject to a condition on behalf of a charity, has been entered upon under such circumstances as to imply a positive acceptance of the devise, the devisees

(1) This decree was affirmed by the House of Lords, on the 20th February, 1800. See *post*, *Andrew v. The Merchant Tailors' Company*, vol. vii. 223; *Andrew v. Trinity Hall*, ix. 525; and upon the doctrine of *cy pres*, as applied to charities, *Moggridge v. Thackwell*, *ante*, i. 464; *post*, vii. 36, and the notes. During the argument the Lord Chancellor mentioned the case of *The Att. Gen. at the relation of the University of Glasgow v. Balaol College*: in Chancery, before Lord Northampton. It arose upon a benefaction by Dr. Snell for four students coming from Glasgow to Balaol College. The information stated great abuses by the College; who had the estate vested in them. They had made bad leases; and there was a good deal of reflection. A point was made to have the exhibitions removed. A peevish answer was put in; and they said, they would have nothing to do with the exhibitions: Lord Northampton gave them time to consider of it; and they repented: but not a doubt was entertained of transferring the exhibitions to another College.

are bound, at all events, to perform the condition; even although the rents and produce should eventually prove inadequate for that purpose: they can make no special agreement, but must either take the estate saddled with the charity as it is given, or renounce it: it is with a view to allowing due time for taking this alternative into consideration, that the suspension of their determination is allowed. *Attorney General v. Christ's Hospital*, 3 Brown, 165; *St. John's College, Cambridge, v. Platt*, Rep. temp. Finch, 222; *Attorney General v. Master of Catherine's Hall, Cambridge*, Jacob's Rep. 392.

2. As to the effect and extent of the exception in the statute of Mortmain in favor of Colleges; see *Attorney General v. Tancred*, Ambl. 352; *S. C.* 1 Eden, 15. It is only where an estate is given to a college *beneficially*, that the exception applies: if it were allowed to operate where the legal interest only is devised to a College in trust for other objects, a ready way would be opened to defeat the whole intention of the statute. *Attorney General v. Munby*, 1 Meriv. 344.

3. With respect to the application of the doctrine of *cy pres* to charitable bequests or devises, see, *ante*, note 3 to *The Attorney General v. The Haberdashers' Company*, 1 V. 295, and notes 4, 5, and 6 to *Moggridge v. Thackwell*, 1 V. 464.

4. A Court of Equity will not act upon an award even, and, *a fortiori*, not upon a compromise, made in a charity cause, without the consent of the Attorney General, or a reference to the Master to ascertain whether the proposed arrangement would be for the benefit of the charity: the latter proceeding certainly entails an increase of costs, but if the precaution were neglected, individuals might improperly concede to each other reciprocal advantages at the expense of the objects of the charity. *Attorney General v. Hewitt*, 9 Ves. 232. There may, indeed, be cases in which the Court would think it unnecessary to send certain points in a charity cause into the Master's office, which can be settled equally well, and at less expense, by reference to a private individual; but such reference is never granted without the consent of the Attorney General on the part of the charity. *Attorney General v. Fea*, 4 Mad. 316. And even then the reference is usually to the individual by his name, not terming him arbitrator, but reserving the determination to the Court. *Attorney General v. Hewitt, ubi supra*.

5. As to the doctrine of election, see the note to *Butricke v. Broadhurst*, 1 V. 171, note 3 to *Blake v. Bunbury*, 1 V. 194, note 1 to *Lady Cavan v. Pulleney*, 2 V. 544, and other references there given.

6. That an executor, in order to entitle himself to a legacy given to him in that character, must have executed, or at least not have manifested any intention to renounce, the trust with which the bounty was coupled, see note 2 to *Abbot v. Massie*, 3 V. 148.

7. The decree made in the principal case was affirmed, on appeal, by the House of Lords, February 20, 1800.

CAVE v. HOLFORD.

[1798, MARCH 9.]

DEVISE by tenant in fee, in case he should die without leaving any issue living at his decease, and subject to such jointure or jointures, as he might make upon the woman he might marry: by lease and release, previous to the marriage of the devisor, the devised estates were conveyed to trustees and their heirs, as to part, subject to certain trusts, to the use of the devisor and his heirs till the marriage; and afterwards, subject to other trusts, to the use of him for life; remainder to trustees, to preserve, &c. remainder, subject to farther trusts, to the use of the first and other sons of the marriage in tail male; remainder to the devisor in fee; and as to the other part, to the use of the devisor till the marriage; and afterwards, subject to a jointure to the intended wife, to the use of the devisor in fee: by an article executed previously to the will in contemplation of the said marriage, provisions were made as the basis of a settlement of the same nature, but in certain respects, different from that, which was executed: the will is revoked as to the whole estate both in law and equity: a settlement having been made previously to the marriage, the articles were laid out of the case; and parol evidence of an intention of to revoke was rejected. (a)

Nature and effect of a will of lands, [p. 651.]

Manner of pleading a devise, [p. 652.]

Revocation of a will by a conveyance never completed, [p. 653.]

Lease for years or life is a revocation of a will *pro tanto* only, [p. 653.]

Mortgages in fee and conveyances in fee for payment of debts revoke a will *pro tanto* only in equity, [p. 654.]

Remainder subject to appointment is vested, liable to be divested, [p. 661.]

If testator makes a feoffment after the will to the use of himself in fee, or suffers a recovery, it is a revocation, [p. 664.]

At common law the use was intended to be in the feoffee or conusee; and is not averred; as it must be, if to the use of the feoffor, &c., [p. 666.]

Conveyance by one seised *ex parte materna*: the use results in the same manner: so if expressly limited to him, [p. 667.]

Tenant in tail with reversion in fee levying a fine lets in the reversion: but suffering a recovery bars it and all incumbrances; and gains a new fee, [p. 674.]

Implication necessary, [p. 676.]

For the state of this case, and the proceedings that took place when it first came before the Lord Chancellor, see the note, *ante*, Vol. II. 604.

The special verdict found upon the ejectment brought under the direction of this Court, and tried at the bar of the Court of Common Pleas, was argued before that Court in Trinity Term 1795, by *Williams*, (b) Serjeant, for the devisee Sir Charles Cave, lessor of the Plaintiff, and *Heywood*, Serjeant, for Mr. Otway, Defendant in right of his wife, the heir at law; and again in Easter Term 1796, by *Le Blanc*, (c)

(a) As to implied revocations of wills, see *ante*, note (a) to *Brydges v. Chandos*, 2 V. 417, a case which is not easily reconciled with *Williams v. Owens*, 2 V. 595.

(b) This is Serjeant Williams, to whom the profession is under such obligations for the learned and luminous annotations of Saunders's Reports. Among the names in the English law, which never enjoyed the honors of the bench, his is conspicuous. His son, the author of the learned and accurate work on Executors, has added to the claims of the name.

(c) Afterwards from 1799 to 1815 one of the Justices of the King's Bench. The following piquant sketch is extracted from the articles entitled, *My Contemporaries*; from the Note-Book of a Retired Barrister, [Mr. Espinasse]; *Frazer's Magazine*, vol. vi. 319:

Sergeant, for the lessor of the Plaintiff, and *Adair*, Sergeant, for the Defendant (1).

On the 25th of November, 1796, the Court pronounced judgment.

ROOKE, J. (a) (after stating the case). The great question upon the special verdict in this ejectment is, whether the will is revoked

"The resignation of Mr. Justice Ashhurst was followed by the appointment of Mr. Justice Lablanc to succeed him. This took place in June, 1799. He had been called sergeant in Hilary Term of the year 1787, at the same time with Baron (afterwards Lord Chief Baron) Thompson and Mr. Justice Lawrence. While at the King's Bench bar, he had a very limited share of practice; but he had argued some cases from his circuit (the Norfolk), with an ability sufficient to show that he had read much, arranged it well, and was accurately informed in his profession.

"His business increased with his assumption of the coif; and, for some years after he had taken it, he held a considerable share of the lead in the Common Pleas and on his circuit. He stated his case with accuracy and precision; his observations and comments were ingenious and well applied, but evidently studied, and delivered without feeling. In speaking, he was tame and unimpressive; his delivery was feeble, and totally destitute of that earnestness and seeming self-conviction of the truth of what he wished to impress upon the minds of others. No varied cadence ever relieved the ear—no quotation ever interrupted the sameness of a shrill monotony—nor classical allusion ever embellished his address to a jury. He was tamely correct, tedious, and unconvincing.

"The gift of a fluent delivery and the talent of persuasion, displayed in brilliant and well chosen language, however valuable to an advocate, are not required to be found in a judge. To possess extensive learning, correct knowledge, and firmness of decision, the result of well formed opinions, are amply sufficient to constitute an able judge. With these Mr. Justice Lablanc was eminently gifted. The correctness with which he decided was worthy of the first judicial character on the bench, and his opinion carried great weight with the rest of the court.

"With the bar he was not popular; but, in his conduct to them, they could find little to blame, less to praise, and nothing to admire. He was always the judge. His high respect for himself seemed to make him dread to unbend into familiarity, and to alarm him, lest, by so doing, he descended from the dignity of his station. He chilled with distant civility; and, while he never offended, never obliged. He affected occasionally to be affable, at the same time that his deportment was cold, distant, and reserved: it conveyed the idea of constrained courtesy, and of manners assumed, not natural. The same dignified feelings seemed to forbid him, when on the bench, to countenance any kind of pleasantry: he neither indulged in it himself, nor encouraged it in others.

"He was of but moderate stature, but carried himself with great erectness, and seemed to consider that dignity consisted in a stiff neck and perpendicular spine. His countenance was not unpleasant, but bore evident marks of self-satisfaction, and full persuasion of the high importance which he considered his situation conferred. To dignity he possessed not a shadow of pretension; but to the accomplishment of spruceness no man had higher pretensions. He was scrupulously attentive to his dress, and appeared to study the advantage to be derived from personal appearance. As a judge on the bench, his conduct to the bar was void of all offence: he rejected applications often with pettishness, but was never wanting in good manners. In private life he was said to be an amiable man.

"In this short sketch, I am anxious to do ample justice to the public as well as private character of Mr. Justice Leblanc. He was an able and upright judge; and in private, a worthy and honorable man. I mean only to say, that out of his own circle he was not a pleasant one."

(1) Goodtitle on the demise of *Holford and Others v. Otway*, 2 H. Blackst. 516; 1 Bos. & Pul. 570; 7 Term Rep. 399.

(a) He was made a Justice of the Common Pleas in 1792, and continued so till 1808.

by this conveyance of lease and release ; the lessor of the Plaintiff claiming under the will : the Defendant in right of his wife, as heir-at-law : whether by force of either of these deeds the devise of the premises in either count is revoked. To decide this question it is necessary to consider the general nature and effect of a will of lands.

According to Blackstone's Commentaries and Lord Mansfield's doctrine in two or three cases, which I will state presently, it is considered as a conveyance declaring the uses : but it differs from other conveyances in this, that it raises no use and passes no interest till the death of the testator : when he dies, it passes to the devisee such estate and interest as is devised out of that legal interest, of which the testator was seised, when he executed the will ; but with this proviso ; that the testator has continued to be seised or possessed without any alteration of the estate from the time of executing the will to the time of his death. To understand this operation of a will we must bear in mind, that in contemplation of law there is a distinction between the land itself, the legal fee or possessory right of inheritance, and the use or equitable right of inheritance. A man may make a conveyance without parting with the actual possession ; and though the legal right passes from him, it will be revested in him as his old use. But if he had parted with the legal fee, the law considers him according to my idea as having another seisin. If therefore the testator conveys away the whole fee-simple after making the will, though he becomes seised again of the old use, yet the conveyance renders the will ineffectual ; not because he intended to revoke the will, but because by the rules of law the will cannot operate. In Fitzg. 240, the rule is laid down by Lord Trevor : " then as to the other part or necessary qualification, which goes to the power of disposing, which is ownership of the land : the law requires that to be complete at the time of making the will : consider, as to this point the law is very strict, that the testator should have a disposing power at the time of making the will ; for it is so far from allowing a subsequent power by acquisition after to make the will good, that it requires a continuance of the same interest, the deviser had at the time of making the will, to remain unaltered even to the time of his death ; for that any even the least alteration of this interest is an actual revocation of such will." Lord Hardwicke in *Sparrow v. Hardcastle* (1) uses Lord Trevor's very words [*652] almost, or at least exactly to the * same effect ; and agreeable to this rule the manner of pleading a devise of land is, that the testator was seised, and being seised he made his will and thereby devised ; and that of such estate in the premises he died seised.

This rule of law is very ancient. The books refer so far back as the 44th year of Edward III ; which is reported both in the Year Book 33, and in the Book of Assizes. Upon that case it must be

observed, that at that time a parol revocation or republication was sufficient: the will therefore might have been revoked without the ceremony of alienation and taking back, and republished without the delivery to the vicar. It seems doubtful from Fitzh. Ab. tit. Devise, pl. 16, and Brook in his Abridgment, tit. Devise, pl. 8, makes a *quære*, (as to which, whether it is Lord Brook's or not, we are not informed,) as to an alienation and taking back: and says, it does not defeat the will made before; because it is no will till death. It seems from the Year Book, that a doubt was entertained as to the form of the issue; because the heir does not deny, that it is the last will, but only denies, that the testator delivered it to the vicar: but whatever doubt there might be upon that case only, if it stood alone, a long series of authorities forbids us at this time to doubt the principle, that a feoffment in fee of a devised estate and taking back the same estate is a revocation of the will. Dyer, 143, b. states the case of 44 Edw. III. and considers it as settled, that the will is void without a new agreement to it; because the alienation is a disagreement. That the devisor must have the land at the time, the devise is made, has never been disputed. It is laid down by Lord Coke in *Butler and Baker's Case*; and it appears from Lord Mansfield, 3 Bur. 1487, to have been the common law as to customary devises before the Statute of Wills. But the question is as to the change of the legal interest, though the testator dies seised of the same uses in the same land. The cases are very strong to show, that is a revocation: 1 Roll. Ab. 615, states, that if a man devise land to I. S. and after makes a feoffment in fee to a stranger to the use of himself in fee, though he is in of his old estate, yet it seems, this is a revocation; for his intent is to have it by the new limitation; and by the feoffment he passes the estate, and the Statute reverts it in him; which is a new purchase. Lord Hardwicke, 3 Atk. 748, considers this as a settled point; so that it does not rest upon Lord Rolle's saying, it seems to be a revocation. Lord Hardwicke states it in *Parsons v. Freeman*, and observes, that it is a prodigious strong case. So if a man devises land to I. S. in fee, and after makes a feoffment of it to *the use of himself for life; [*653] remainder to his wife for life; remainder to his own right heirs in fee; there, says Lord Rolle, 616, though he has his old reversion, yet it seems, that his intent was to have it pass by the livery, and to be in by the Statute and limitation; and so as a new purchase; and for that it seems, this shall be a revocation of the fee as well as for the life of the wife.

I shall observe here, that though Lord Rolle states this to have been so settled in *Mountague v. Jefferies*, yet according to the state of that case in Popham, 108, it was not the principal point. It is cited again by Yelverton, Cro. Car. 24. Then came *Hussey's Case*, Moor, 789. That is still stronger; but upon the same principle. The feoffment was adjudged a countermand of the will: but the Court say, that it was sufficient to declare the uses of the feoffment, Therefore though they protected the devisee, or rather the *Cestuy*

que use, as against an escheat, yet they did it by considering the will as a declaration of uses; and held, that in strict law the feoffment was a countermand of the will. In some of these cases the intent of the party is mentioned: but you must distinguish between an intention to have the land as a new purchase and an intention to revoke the will. Lord Mansfield, when Solicitor General, arguing *Parsons v. Freeman*, says, there is a revocation, which does not depend upon the intention of the testator; as where he takes back the very same estate. The consequence of law is, that the will is revoked, whether he intended to revoke it, or not. There are other cases, where, intending to revoke, a man has made use of a mode of conveyance, which is never completed. As where a man grants a reversion upon an estate for life, which he had devised; and the tenant never attorns. So in the case of bargain and sale without enrolment. But the revocation applicable to this case is, where the testator alters his legal interest without any intention to revoke the will. As to that, if it is only by a lease for years or for life, it is only a revocation *pro tanto*. But if the whole fee is conveyed, it annuls entirely the effect of the will, unless the testator republishes it. This is established by a series of cases down to this day. I shall not go through them all. *Dister v. Dister*, 3 Lev. 108, is the next in order. It is to be observed upon that case, that there was no change of the use; for according to *Martin v. Strachan*, of which there is a very accurate note in 5 Term Rep. B. R. 107, [* 654] *the testator took back the old use. *Lord Lincoln's Case*, 1 Eq. Ca. Ab. 411. Show. P. C. 154. *Martin v. Savage*, 3 Barnard, 189. *Parsons v. Freeman*, 3 Atk. 741; Amb. 116; 1 Wils. 308, and *Sparrow v. Hardcastle*, 3 Atk. 798. Amb. 224, all confirm the rule; and in the last case Lord Hardwicke observes, that there having been a uniform series of opinions in this point, it ought not to be varied. In *Brydges v. The Duchess of Chandos*, (*ante*, Vol. II. 417,) this subject is very ably and elaborately discussed and the rule confirmed by the Lord Chancellor; and he asserts the same doctrine; and states himself to be warranted by a more correct note than that in Atkyns of *Parsons v. Freeman*; which is given at large in the report (*ante*, Vol. II. 431).

There are some exceptions to this rule: but they prove the rule; and go upon an admission of it. The first exception is the case of partition. That, it must be observed, does not respect joint tenants; for they have no power by the Statute of Henry VIII. to devise; and if one does devise, and makes partition afterwards, he must republish his will: *Swift v. Roberts*, 3 Burr. 1488: but parceners and tenants in common being seised only of an undivided portion in the whole would retain the same estate and interest after partition; and if it is done by deed and fine instead of by writ, the Court has so far indulged them as to say, the prior devise is not revoked. *Luther v. Kidby*, 8 Vin. 148, pl. 30. 3 P. Will. 170, n. (1). We are left to conjecture the grounds of this determination.

(1) *Risley v. Lady Baltinglass*, Sir T. Raym. 240.

But Courts of Law are rigid even in this indulgence ; for in *Tickner v. Tickner*, Chief Justice Lee, one of the Judges, who had signed the certificate in *Luther v. Kidby*, held, that the deed giving a moiety to such uses, as the testator should appoint, and in default of appointment, to him in fee, was a revocation (1). That case is mentioned and acceded to by Lord Hardwicke in *Parsons v. Freeman*.

There are other exceptions : namely, mortgages and conveyances for payment of debts. It is not necessary to notice them : as they are subjects of equitable jurisdiction, and we are sitting in a Court of Law. Notwithstanding these exceptions the general rule of law is, that where a testator conveys his whole interest, whether by feoffment, lease and release, bargain and sale, fine or *recovery, the will is ineffectual at law. It is [* 655] often contrary to the intention of the testator, that the will should be annulled : it often bears hard upon individuals to enforce the rule strictly : but the rule is so ; and if it produces more mischief than good, the Legislature in its wisdom may alter it : but we are bound as Judges to declare and to abide by it. In vindication of the rule however I must observe some circumstances. First, it is in favor of the heir-at-law : who is always an object of legal favor : Secondly, it is ancient, and as much a part of our jurisprudence as the rule, that excludes the father from inheriting immediately to his son, and the rule, that excludes the half blood from inheriting at all ; and thirdly, it cannot operate upon one, that is *inops consilii*, who has no opportunity of being advised upon the subject, for if a man is sufficiently strong in mind and body, and well enough assisted, to execute a solemn deed, which passes away his legal interest, he surely may, if he pays attention to it, republish his will ; and it is a plain, simple, and perfectly intelligible, rule ; for it is only, that, if he will not run the risk of being within some of the exceptions, he must republish his will after making the conveyance. If where there is so plain a rule, the party omits to conform to it, the disappointment of the devisee is to be attributed, not to the rigor of the law, but the negligence of the parties ; who will either take no advice or such as is likely to mislead them.

Having laid down this as my notion of the rule of law, let us see, what is this case. I lay the articles quite out of the case ; for they were to be performed after marriage, and this is a voluntary performance before marriage ; and if this was a question merely of performance of articles, it would be more a case for a Court of Equity than of Law. The deeds as to the Swinford and South Kilworth estates I consider as a conveyance to trustees in fee for the special purpose of securing a jointure to the wife. Had he conveyed for the life of the wife, I should have thought it a revocation *pro tanto* only : but being a conveyance in fee, I am of opinion, it is a revocation of the will as to these estates ; and it is much

(1) *Nott v. Shirley*, *ante*, vol. ii. 604, n.

stronger as to the Stanford estates. Therefore my opinion is, that there must be judgment for the heir-at-law.

HEATH, J. (a) We are all agreed, that the will is revoked as to the Stanford estates: we are divided as to the Swinford [* 656] and *South Kilworth estates. The rule must be extracted from the series of authorities in the books. They

(a) He became a Justice of the Common Pleas in 1780, and died in 1815. The following sketch of this respectable magistrate is taken from the series of articles entitled, *My Contemporaries*; from the *Note-Book of a Retired Barrister*, [Mr. Espinasse]; *Frazer's Magazine*, vol. vi. pp. 427, 428:

"Mr. Justice Heath was almost invariably one of the judges who went the circuit for very many years. I had the good fortune to practise before him. He was in some measure considered as identified with its members, and was with them equally an object of attachment and respect. He was a most able lawyer, of deep and extensive reading, and of the soundest judgment. He affected no parade of judicial dignity, nor assumption from his station. Plain and unassuming, his whole mind was bent upon business, from which nothing could divert his attention. When a cause before him was called on, with almost immovable taciturnity, and with his eyes close to the paper on which he wrote, he took down the evidence of the witnesses as they appeared before him. He never broke in upon their examination by observation or comment; but a powerful discernment soon enabled him to make up his mind; and when he asked the question, addressing himself to the counsel against whose case the weight of evidence appeared to bear, 'Well, Mr. ———, what do you say to this?' we knew the opinion which he had formed, and that it was not easily shaken, and submitted to it without contest. We knew the depth of his learning and the solidity of his judgment.

"He heard every objection taken, or point raised on matter of law, in the course of the cause, without interruption, and with exemplary patience. He pronounced his opinion on them with promptness and precision; and the correctness of the points which he ruled was such, that in the course of so many years I do not recollect one in which he was found to have given a misdirection to a jury. Their accuracy could only be equalled by the brevity with which they were delivered; though it must be allowed that they possessed little of the graces of diction or delivery. His language was unstudied, and his voice harsh and indistinct.

"I revered the character of this learned judge, and always listened to him with profound attention. The ideas which I formed of it were the result of observation on his mode of administering justice during the very long period of his going the circuit. He was an admirable judge of human nature, and scanned with great depth of discernment the motives, the partialities, and prejudices, of those who were called as witnesses before him. He addressed no observation to them while under examination; but he never failed to make them to the jury, as they affected the credit due to their testimony. He seemed never to overlook an inaccuracy, nor to let a contradiction escape him. They were observed upon in the plainest language, which detracted nothing from their effect; they were unincumbered with distinctions, and delivered in the fewest words which our language could furnish, but their accuracy was unequalled.

"As a criminal judge, Mr. Justice Heath possessed in a superior degree the talent of seeing into the true characters of those whom he had to try. He drew the just distinction between settled depravity in the commission of crime, and what was unmarked by habitual delinquency. To the former he was inflexibly severe, to the latter lenient and merciful. He held the mawkish or affected feelings of those who were for the indiscriminate abolishing of capital punishments, in all cases where the offence was against private property only, in great contempt. For what purpose, he would say, were laws made but for its protection? Severity in him proceeded not from a want of merciful feeling, but from a firm conviction of its necessity, to guard against the commission of crime. That there are those in society upon whom nothing short of the fear of death can have effect or deter from the perpetration of crime, was the sound, the deliberate, and well-formed opinion of that excellent judge, I feel no difficulty in asserting.

have been very ably reviewed by my Brother Rooke; therefore I shall only allude to them. I observe, my Brother Rooke seems to think, that what is laid down by Brook is not of much authority: but I have always understood that the abridgers had access to the records themselves: and many cases, that appear in the Year Books with an *Adjournatur*, are laid down by them as decided; which could be only by their having access to records. A revocation of a will is effected by operation of law, sometimes even against the intention; of which there are cases referred to in 1 Rol. Ab. 614, 615. To show, that any change of the estate would operate as a revocation as well after the Statute of Uses as before, there are *Mountague v. Jefferies*, *Lord Lincoln's Case*, *Parsons v. Freeman*, *Sparrow v. Hardcastle*, *Darley v. Darley*, and *Brydges v. The Duchess of Chandos*. Some of these cases were at Law; others in Equity. Upon these authorities I think, the will as to the Stanford estates is revoked by the settlement.

It remains to be discussed, whether that settlement differs essentially from that of the Swinford and South Kilworth estates; and the latter is to receive a different construction. It is material to observe, that in both conveyances the whole legal estate is vested in trustees to the use of the settlor till the marriage. The subsequent estates are merely springing uses, arising after the marriage. This is precisely the case of *Mountague v. Jefferies*, and that of the Earl of Lincoln. The circumstance of the marriage taking effect is totally immaterial: the revocation is complete by the execution of the settlement. In both of these settlements there are many limitations in pursuance of the articles with the remainder in fee to the settlor. *Luther v. Kidby* and *Tickner v. Tickner* appear to me very difficult to be reconciled with some of the other cases and with each other. We are not told, but, as my Brother Rooke has observed, we are left to conjecture, the grounds of the former. It might influence the opinion of the Court, that a partition is compulsory

"I sat next to him, at an assize at Maidstone, at the circuit-table. It was at the time that Sir Samuel Romilly's acts were depending before Parliament. The effect of them was much canvassed, and serious doubts raised whether it would not be to strip the criminal code of the country of the only sanction by which it could be enforced,—punishment by death. It became the subject of conversation. 'Mr. ———,' said the learned judge to me, 'Sir Samuel Romilly is endeavoring to make a great change in our criminal law, by abolishing capital punishments. I do not approve of it; they cannot be dispensed with; and I'll give you a proof of the necessity and effect of them.'

"'At one time the robbing of bleach-grounds had grown to a great extent, almost ruinous to the manufacturers and the proprietors of the grounds. It had arisen to that pitch, that the thieves had been known to bring down a waggon, and to have swept off at once the whole of the goods on the bleaching-ground. The law as it then stood was unequal to the protection of the proprietors of the grounds, and it became necessary to apply to Parliament for redress. An act was accordingly passed (stat. 51, Geo. III. ch. 51) for the purpose, making the robbing of bleach-grounds a capital felony. At the next assizes for Surrey, after the passing of it, three men were indicted before me for robbing a bleach-green at Croydon. They were capitally convicted: I hanged them all. There was no more robbing of bleach-greens afterwards in Surrey.'"

and not voluntary. To refuse it is stated in the writ of partition to be an injustice. The writ is merely brought to affirm the possession; as in *Dyer*, 79 *b*, or to ascertain the possession; as is stated in Lord Hale's Commentary upon the writ *De partitione facienda* in Fitzherbert's Abridgment, 142. The legal estate of the party is not touched by the writ of partition. It might be, that [* 657] the Judges thought, partition by deed ought not *to have a greater effect than partition by writ: and that no act of the testator, that was not voluntary, ought to operate as an implied revocation; considering too, that the parties were tenants in common; that they could not make partition by release; and could do it voluntarily no other way than by parting with the whole fee. However that may be, it is difficult to reconcile that case with *Tickner v. Tickner*. The only difference between them is the power of appointment in the latter; and though the execution of the power would operate as a revocation of the will, yet the reservation of the power in my apprehension would not have that effect. It is introduced into the conveyance, not lightly and without reason, but for a very important purpose; to enable them to bar the claim of dower (1); therefore as well in respect of dower as the prior devise, if the power was executed, the former would be defeated, the latter revoked. In *Mountague v. Jefferies* a covenant to make a feoffment was held no revocation, 1 Rol. Abr. 615 (2); though a feoffment is so; which was much stronger than the case of a power. *Luther v. Kidby* is therefore, I think, over-ruled by *Tickner v. Tickner* (3). We are relieved from the cases of conveyances of the whole fee for partial and particular purposes; for they belong to Courts of Equity, not of Law.

I think myself bound by the series of these decisions, with the single exception of *Luther v. Kidby*, and that with the explanation, I have given to it, to say, that the testator has revoked the will by the conveyance; the old use remaining untouched.

BULLER, J (a). This case has been already spoken to so fully and elaborately, that I shall observe only upon a few of the arguments used at the bar. The principal ground for the Plaintiff was that the articles, the will and the deeds, are to be taken as one transaction: and therefore upon the authority of *Schwyn v. Schwyn*, 2 Bur. 1131, there is no revocation: but this case and that appear to me as different as any two, that can be named. In that the deed to make the tenant to the *præcipe* was the most essential part of the recovery; and therefore the recovery related to that deed; which

(1) *Post*, vol. x. 263; *Ray v. Pung*, 5 Madd. 310, and 5 Barn. & Ald. 561.

(2) Later authorities have established, that a will may be revoked by a covenant: *Rider v. Wager*, *Cotter v. Loyer*, 2 P. Wms. 328, 622; which cases are admitted by the Lord Chancellor in *Brydges v. The Duchess of Chandos*, *ante*, vol. ii. 436; *post*, *Knollys v. Alcock*, v. 648; vii. 558; *Vaußer v. Jeffrey*, xvi. 519.

(3) See *post*, vol. x. 256.

(a) For a sketch of the character of Mr. Justice Buller, see *ante*, note (a) to *Lewis v. Praed*, 1 V. 19.

was executed long before the date of the will. Besides we are told by Sir James Burrow, who had certainly the highest *assistance (a) in stating what he calls a probable ground [*658] of the judgment, that the ground was, that the testator had a voidable use under the bargain and sale; which use was devisable; and that the subsequent recovery executed such use, and made it absolute. In this case the articles form no part of the deeds. The parties might have made very different provisions from those of the articles: and if that was done before marriage, neither Law nor Equity could have altered it. Though in the present case the deed is said to be made in pursuance of the articles, it could not relate back to the articles, or give the legal estate from that time; as in *Schwyn v. Schwyn*. The will has neither an express nor a necessary reference to the articles or the settlement. It does not profess to carry the articles into execution; but is made with a more general view to the circumstances the testator and his relations then stood in. By the articles he contracted to settle the Stanford estates upon his eldest son and his heirs male in strict settlement. By the settlement the estate is given to the first and other sons of that marriage only; which I presume was the subsequent intention and agreement of the parties. The will is made *diverso intuitu*, and is not to take effect, if he leaves any issue, male or female. The will is not confined to the jointure agreed to be secured to Lady Lucy Sherrard; but is subject to any jointure or jointures, he might make upon the woman, he might happen to marry. If I was at liberty to conjecture from the time of making the will and his state of health, I should think, the will was intended to take place only if he died before he married: but I am not at liberty to go out of the record. Upon this record we are to pronounce, whether the will is revoked or not. We are now to pronounce upon different instruments conveying the legal estate. The articles do not convey any legal interest, and are not noticed in the will; therefore I think now, as I thought at the trial, that they ought not to have formed a part of the special verdict, and we cannot take notice of them. We cannot set right any mistake; but are bound to pronounce upon the effect of the deed, as it stands upon the record. Then the question is, whether the deed makes such an alteration in the estate as to be a revocation of the will. All the estate is conveyed to trustees in fee; therefore I can make no difference between the different parts of the property. Considering it in this light, the point of revocation is so fully established by ancient and modern authorities, that any doubt about it at this time seems calculated to shake the rules of property. I shall only *state them shortly. The case in Roll's [*659] Abridgment goes upon the ground, that the testator had the old reversion; yet it is said to be a revocation. In *Godbolt v. Freeman*, 3 Lev. 406, the estate taken back was held to be the old use, and therefore to go to the heir *ex parte materna*. In *Abbot v.*

(a) The notes of Lord Mansfield.

Burton, 2 Salk. 590, it was still held, that being the old use, the heir *ex parte materna* should take, and that there was no difference between an express limitation and a use resulting in law. In these two last cases there was no question about a revocation; and the authority of the case in Rolle's Abridgment is left wholly untouched. Under that there is no doubt, that a previous will in either of those cases would have been revoked by the subsequent feoffment or fine and recovery. The case in Rolle's Abridgment goes beyond the case of *Abbot v. Burton*; for in the latter the use was out of the party, and was vested in trustees: but in the former it never was in any other person; and yet it was held a revocation.

Then came *Lord Lincoln's Case*. It has happened that in many subsequent cases that determination has been lamented: but it was never denied. In *Doe v. Potts*, Doug. 723, Lord Mansfield went so far as to say, the absurdity of it was shocking: but he added, it is now law. Perhaps the misfortune there was, that the deed was not attacked upon the ground of insanity. But let us see, how it was received in Westminster Hall. In Fitzg. 241, Lord Trevor puts the case thus: "Where there is tenant in fee-simple, and he devises his lands to another, and after that, and some time before his death, he makes a feoffment of these lands to another to the use of himself and his heirs, though this to some purpose is no alteration, for he is absolute owner of the estate, as before, yet this does not make the will good, but it is a revocation thereof: and so it was adjudged in the case of my Lord Lincoln through so small an alteration."

That shows, he understood *Lord Lincoln's Case* to proceed wholly upon the ground of the first limitation to himself and his heirs, without any regard to the limitations upon the marriage, which never took effect. *Parsons v. Freeman*, *Sparrow v. Hardcastle*, and *Darley v. Darley*, 3 Wils. 6, all go upon the same ground. In *Sparrow v. Hardcastle*, Lord Hardwicke says, "that if a person seised in fee suffers a recovery for the express purpose of confirming his will, yet it is a revocation. In 3 P. Wms. 165, there is a pretty strong pas-

sage, stating the case, where a man devises, and afterwards [*660] makes a feoffment, "though to the use of himself and his heirs, and though this use be the old use and the old estate, yet according to the several cases in 1 Rolle's Abr. 614, title Devises revoked, this is a revocation; and the case in 3 Lev. 108, *Dister v. Dister*, was cited as in the very point; of which opinion was also the Lord Chancellor."

That case is put as upon the absolute fee-simple; and is admitted as clear by the Chancellor. The only other case, I shall mention, is *Brydges v. The Duchess of Chandos*. The limitations of the deed were exactly the same as those of the articles: and it was determined both in the Court of Chancery and in the House of Lords, where all the Law Lords attended, that it was a revocation; and if the will was revoked in Equity, *a fortiori* it was a revocation at law.

As to the case of partition, it is a case *sui generis*; and therefore

if there was no distinction between that case and others, I should not hold myself at liberty to overturn all the uniform decisions, that have taken place in such a series. But it is materially distinguishable; and the determinations are founded wholly upon that. A tenant in common has a right to his part only, though he occupies the whole in common. He can sell, devise and give, that part only; and by law, any one has a right to have his part set out by metes and bounds: and when it is so set out, he has the same estate and interest, as he had before. In *Webb v. Temple*, 1 Freem. 542, the ground was, that no material alteration was made: yet the Court was divided: but the partition was not by the fine, but previous to it. If the partition was by writ against the wish of the testator, it was no revocation. It is but one step more to hold, that the same thing by deed or fine should not have a different effect: but whether that is right or not may be a question. In *Luther v. Kidby*, 8 Vin. 148, there was only a covenant to levy a fine; and the authority of it may be questionable. But supposing it to be law, it only goes to this, that there is no difference between a fine in consequence of a covenant and the writ: but the Court did not mean to lay down a rule applicable to any other case: on the contrary a case of revocation is stated, which perhaps would not be so decided since the case of *Schwyn v. Schwyn*: "if A. devises land, and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ * of covenant and not from the caption." But taking the [*661] whole case together, it seems as if it was thought, there was a difference between a fine for partition and for any other purpose. If the fine was the operative instrument in *Luther v. Kidby*, the authority of that case seems considerably shaken by *Tickner v. Tickner*, and what Lord Hardwicke says in *Parsons v. Freeman* and *Sparrow v. Hardcastle*. In *Tickner v. Tickner* the fee and the whole use were vested in the testator; and yet because the partition was made by means of a conveyance to a trustee, it was held to be a revocation. I say, the fee was vested in the testator; because that point is determined in different cases (1). In *Doe v. Martin*, 4 Term Rep. B. R. 39, the remainder in fee to the children subject to the appointment was held vested, liable to be divested. Lord Kenyon there says, "this estate was limited to Bethia Willis and to her heirs, until the marriage should be solemnized;" and his observation upon it is this: "it was therefore intended, that the legal estate should not be taken out of her, unless the marriage took effect."

So I say upon *Lord Lincoln's Case*. It turned entirely upon the limitation to himself till the marriage. The legal estate was not taken out of the testator till the marriage either in that case or in this. In *Idle v. Cook*, 2 Lord Raym. 1150, and *Cunningham v.*

(1) *Ante*, *Smith v. Lord Camelford*, vol. ii. 698, and the note, 706, vol. i. 309.

Moody, 1 Ves. 174, the same point was settled as to the vesting. Apply those cases to *Tickner v. Tickner*. The fee vested previously to an appointment; and then the deed and fine were the sole ground of revocation in that case; and not the limitation of any new use. If so, it is in direct contradiction to *Luther v. Kidby* (1); and the report of *Parsons v. Freeman* in Ambler shows, it was so considered. There Lord Hardwicke approved of *Tickner v. Tickner*, and said, it was the same case as that before him. If there is no distinction between the case of partition and other cases, where the partition is made by deed and fine, *Luther v. Kidby*, supposing the partition made by fine, must fall. We are not informed of the reasons of it. They are left to conjecture. If it be law, it must be upon this, that partition is a single case. But in *Sparrow v. Hardcastle*, Lord Hardwicke expressly denies, that there is any distinction from the particular purpose. If the estate is conveyed to [* 662] trustees, though for an infant, and the old *use remains, the later cases establish it as a revocation. Chief Justice Lee was one of the Judges, who decided *Luther v. Kidby*: and his judgment in *Tickner v. Tickner* seems to me a correction of his former opinion, made probably after conversation with Lord Hardwicke; who upon all occasions approved of the last decision. The reason is, that when a man makes a conveyance, he not only actually transfers the estate, he had, but he means the estate to pass under that deed, not under any former deed or will.

Therefore I am of opinion with my Brothers Rooke and Heath, that there ought to be judgment for the Defendant.

EYRE, Ch. J. (a) Though this doctrine of revocation has been carried to a very inconvenient extent, in consequence of which many wills have been cruelly disappointed, and many families greatly distressed, I agree, that the judges are not to be wiser than the law; that their duty is to declare and execute the law as it is, and not to strain it in order to mould it to their conception of what it ought to be: I therefore declare in the outset, having the misfortune to differ in the conclusion, I draw, from the other Judges, that I distinctly acknowledge every principle, that governs the law of Revocation, and submit to the authority of what is to be found in the books, in the points, to which the cases go; but when the cases are urged as illustrations of those principles, and as furnishing rules for the application of them to the particular case under consideration, I conceive, that without incurring the imputation of removing land-marks or breaking in upon the rules of property I may, and it is my duty to, inquire, whether the cases are sufficiently uniform or approaching in circumstances sufficiently near to control my judgment in a case, which I think new in circumstance, and depending upon a principle in the Law of Revocation, that has not undergone much legal discussion.

(1) *Post*, vol. x. 256.

(a) For a slight sketch of this judge, whose opinions are always read with satisfaction, see *ante*, note (a) to *Bull v. Vardy*, 1 V. 270; also, 2 V. 61.

I reduce the argument to the point of difference between us; and I declare, that *Lord Lincoln's Case*, which, I admit, ought not to be now shaken, and the late case upon the Duke of Chandos's will, do approach sufficiently near to be an authority for determining, that the deeds first stated in this special verdict do amount to a revocation of the will as to the Stanford estates. My doubt is upon the second conveyance stated in the verdict: and I conceive, that, let the operation of the last-mentioned conveyance be what * it may, the testator died seised of that estate, which [* 663] he had at the time he executed the will, and there is no ground to raise a presumption in law from the conveyance, that he intended to revoke the will; and therefore that the will may operate upon it; and that I may be clearly understood, when I say the same estate, I do not mean the identity of the land, but the quality of estate and interest in that land: I mean to argue, that he died seised of the old use; to which the new estate, right, title and possession, (to use the words of the Statute) that was for a moment in the trustees under the conveyance, had united itself, not as a new estate, right, title and possession, but according to the quality, manner, form and condition, of that old use; for those are the words of the Statute. Here I take my ground. If I fail in supporting that, the will is revoked: if I maintain it, upon the principle of the Law of Revocation I shall be right in declaring, that the will is not revoked, and the authorities will be better reconciled by that judgment, than by declaring, that it is revoked.

Wills are said to be revoked, first, in the proper sense of that word, when the testator has signified his intention, that the will he has made, shall not be his last will; or when he does certain acts, or certain alterations have taken place in his situation, so necessarily inferring an intention to revoke it, that the law will presume it. That is what we call implied revocation. Some of the instances of the last sort are dispositions of property inconsistent with the will; such as giving by a subsequent deed a greater or less interest to the same person, to whom some interest was devised by the will. Both cannot take effect. That by the deed must. Therefore that is a case of necessary implication. So a feoffment, upon which there was no livery, or a bargain and sale never enrolled: though there is no alteration in the estate, the law implies a revocation; because the testator going so far towards an alteration manifests his intention, that the disposition made by the will should not stand. Marriage and the birth of a child are an instance of alteration of circumstances working a revocation upon the same principle, raising a presumption of law. All these are modes of revocation in the proper sense of the word. But secondly, wills are said to be revoked in an improper sense, where no actual intention to revoke is proved from acts or circumstances of the testator; as where the subject devised is destroyed, or parted with, and never comes back to the testator; or the same lands have come back to him under modifications of the interest and by force of some

legal conveyance. In the latter instance the will cannot take effect for technical reasons: in the former the will is rather annulled, as Wentworth expresses it in his Office of an Executor, than revoked: but the language is, that it is revoked. Lord Hardwicke calls the extinguishing or destroying the thing devised a virtual revocation: how improperly, appears from this; that the subject is gone by parting with the thing: but the will is not revoked; not even virtually. A revoked will can be republished: but a republication will not bring back the estate, upon which the will was to operate. By construction upon the Statute a will can operate only upon the estate, the testator had at the time he executed it; therefore in pleading it must be stated, that the party was seised; and he afterwards devised; and that he died so seised. If the estate therefore comes back with modifications of the whole interest, or he takes back an estate by purchase, the will cannot operate upon the new estate, totally independent of the law of Revocation. It is not the same estate strictly speaking. Suppose he takes a fee-simple: it is not that fee-simple, which he had at the time of making his will, but another, derived by a different title, perhaps descendible in a different course. Suppose, a man seised *ex parte materna* sells the estate and afterwards thinks fit to buy it again; (I avoid the *equivoque* of the word "purchase") he would take it as a new estate; and it would descend to his heirs *ex parte paterna*. This is a legal quality inherent in a new purchased estate; and distinguishes it from the old estate; and by that we should be relieved from the senseless jargon, we have heard, of the *quasi* the old estate: a term used in some of the old cases, and denoting something, which is neither the old estate nor the new estate, but something between both, something perfectly anomalous and unintelligible, with no legal quality, and perfectly inoperative but for the mischievous purpose of disappointing the will. There is a rule, not a principle, which is now become a common rule of property, and for that reason sacred; that if the testator makes a feoffment after the will to the use of himself in fee, or suffers a recovery, it is a revocation; and when the case *in ipsissimis terminis* occurs, we must apply that rule: but it is very different, where the rule is to be applied to another case not *in ipsissimis terminis*: the principle must be then extracted. It was argued, that this rule is bottomed in another rule; that if after making the will the testator parts with his estate or divests himself of it for a moment, he has revoked the *will; and it is truly said, that this will reach beyond cases of feoffment or other conveyance to the use of the feoffor in fee: but that rule is exemplified no where but in the cases, they suppose to flow from it: which is in my opinion arguing in a circle. The case, where the testator takes back the old use, Lord Hardwicke calls a prodigious strong case, and says, it must arise from a presumed intention to revoke the will: it must be presumed, he would not have made the new conveyance without an intention to revoke. If this be the reason of the rule, I understand it, and perceive distinctly, under

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what head of the Law of Revocation I am to class these cases. They are not anomalous, or *positivi juris* : they are only the application of a clear principle in the Law of Revocation ; that where an intention to revoke is demonstrated by the testator, he has revoked the will. If that ground is rejected, I must understand it as a positive rule ; and that rule is confined to these cases.

These few observations upon the doctrine will serve to show the bearings of my proposition ; that the testator died seised of his old estate, which he had, when he made the will ; and has made no demonstration of an intention to revoke it ; whence I conclude, he has not revoked it. As to this last part of the proposition, demonstration of an intention to revoke, the case is destitute of the least ground of intention to revoke. It was expressly, and very wisely, laid out of the argument by my Brother Adair. I felt the difficulty for a time as to the old use during the time, the testator was seised of a base fee only, a fee determinable on his marriage. Mr. Hargrave in one of his notes upon Coke Littleton (1) has entered into a very elaborate and able discussion of this. In strict law the reverter seemed to be a possibility, which vested in the releesee ; and when it did revert to the releesee for the purpose of securing the rent-charge, I doubted, whether the use subject to the rent-charge was to be considered as the old use or a new springing use ; but as it did not arise to a stranger, but was to be considered as not disposed of, and all this perplexity arose upon the form of the conveyance, and upon the authority of *Abbot v. Burton*, 2 Salk. 590, I satisfied myself, it was the old use, and never in construction of law out of the testator ; and that is the true idea, the word “resulting,” applicable to this subject, is meant to express.

* I proceed to show, that it was the old use. This cannot be denied ; that the intent of the parties in the latter deed and the whole substantial effect (be its formal operation what it may) was simply to secure a jointure of 1400*l.* ; and the estate, subject to that, was not intended to be altered, or in any manner affected ; and as far as the form of the conveyance purports to alter the nature and quality of the estate, it goes beyond the object of the conveyance. Courts of Justice not only do not incline to allow the form of the conveyance to go beyond the intention, but will be ready to adopt all expedients to prevent it ; and to confine the operation of every conveyance to the special purpose. *Abbot v. Burton* is an authority for the general doctrine ; and in *Parsons v. Freeman* Lord Hardwicke applies it to the particular case of revocation, laying it down as a general rule, that conveyances for a special purpose, whether feoffment, lease and release, fine or recovery, shall not operate beyond the special purpose, and against the intention revoke the will. The testator by the form of the conveyance takes a base fee determinable upon the marriage ; when the seisin reverted to the releesees for the purpose only of executing the only

(1) Co. Litt. 12, b, note 2.

use of conveyance ; viz. for securing a jointure ; for though it affected to dispose of the rest, the law is clear, that it was in the testator, independent of that disposition. The simple purpose of all this form is to secure the jointure. If that had been effected by another mode of conveyance, it is clear, and my Brothers, I believe, understand it so, that the will would not have been revoked. But Lord Hardwicke says, if the conveyance is for a special purpose, it shall not go beyond that purpose ; and the will is not revoked ; the form is instrumental only. I do not mean to adhere to the strict letter, that it is for a special purpose : it must be, I agree, a purpose, that leaves the substance of the fee untouched to go according to the will ; a purpose therefore not inconsistent with the will. If the special purpose requires, that the whole fee shall be disposed of against the will, I agree then, the will is revoked. Upon the supposition, that this special purpose was not to exhaust the fee, but to leave it undisposed of, I take it to be clear, this is not a case of revocation. But still it is necessary for the lessor of the Plaintiff to make out, what he must have averred in pleading, that the testator died seised. Suppose, the deed did not purport to limit the rest of the estate : must

not the use have reverted to him, as never disposed of?

[* 667] At the common *law the use was always intended to be in the feoffee or conusee ; and a rule of pleading is established upon it ; which is stated by Lord Holt in *Lord Anglesea v. Lord Altham*, 2 Salk. 676 ; that it is not averred ; as it must be, if to the use of the feoffor or conusor. I admit, there is in this case an express remainder in fee to the testator : what is the difference? Another proposition is clear in law ; that the use declared, and which, if not declared, would have resulted, is one and the same use ; and this is not a mere dry proposition, productive of no legal consequence : the course of dissent is regulated by it. For instance, in the case of the conveyance by a man seised *ex parte materna* the use results to him in the same manner ; so it is, where the use is expressly limited to the party, from whom the estate moved : it would be in him as his old estate, and go to the heirs *ex parte materna* : Co. Lit. 13 a. *Abbot v. Burton* ; and that case is recognized in *Martin v. Strachan*, 5 Term Rep. B. B. 107. In *Abbot v. Burton* they attempted to alter the descensible quality of the use by arguments drawn from the form of the conveyance ; which was fine and recovery. To that the Chief Justice said, the fine and recovery were both to be taken as one entire conveyance, consisting of these several parts and directed as to the use of them by the same covenants : that though the conusees had a seisin in fee of the estate and use vested in them by the fine for a special purpose, and upon that seisin the recovery was had, and in strictness the estate passed by it was their estate, yet upon consideration of the whole conveyance the estate did originally move from the conusor of the fine ; and for that reason, if there had been no limitation of the remainder of the use upon the recovery, he took it to be very clear, that so much as remained unlimited should result to the conusor and his heirs, and

not to the conusee; in whom the estate was not vested with a purpose to create him any interest, but in order to forward and complete the conveyance of the conusor's estate; which was taken as one conveyance; then the use limited upon the recovery arises as properly out of the estate that moved from the conusor of the fine, as if he had made a feoffment or fine on any single conveyance to that use.

This doctrine relieves us from all difficulty from the form of the conveyance. If, though by the form of the conveyance the estate was taken from the conusees, yet still the use might result from the estate of the conusor, because in substance it was his * conveyance, it follows, that as this jointure was created [* 668] by conveying an estate to the trustees by lease and release for that single purpose only, the form shall not operate beyond the purpose and the effect of the conveyance; for if it does in this case, why did it not in that? This doctrine justifies my observation, that Courts of Justice are not inclined to allow the form to prevail against the intention: but it goes farther; for Lord Trevor observes, what is repeated by Lord Chief Justice Lee in *Martin v. Strachan*, that the use limited upon the common recovery arises out of the estate of the conusor not the conusee. We know, it is the definition of a use separated from the land, that it is collateral to the seisin of the land; and when the statute unites the seisin and the use, it is according to the quality of the use, not of the seisin; therefore if the use is the old use, when the seisin is united to it, it must be the old estate; and I cannot agree, that the union is to be considered as a new feoffment; for if so, it would be taken back as a new estate and by purchase; the contrary of which is resolved in all the cases, that are to be found. Therefore it is not in any degree analogous to a re-conveyance by a new feoffment; and my farther conclusion is, that the testator died seised of that estate, of which he was seised at the time, he made the will; with this alteration, that by those deeds he has created a charge upon the estate of 1400*l.* a-year for a jointure, with a term of 500 years to secure it. Here is an alteration. That alterations in an estate in many instances work a revocation, I admit. It is one of the general heads of the Law of Revocation. But the law is clear, that an alteration of this nature shall not revoke a will. It is settled over and over again, that a lease for years or even for life after a devise of the fee will not revoke a will. Both these cases are put in *Mountague v. Jefferies*, 1 Bro. Ab. tit. Devise, 615. Cro. Jac. 49. Cro. Car. 23; and there are many modern cases to the same effect. They call it a revocation *pro tanto*. That is an improper use of the word; for the truth is, part of the thing devised is gone, and therefore the will cannot operate, without even an intention to revoke. In this case there is not even a partial revocation; for the will purports to operate only upon that part of the fee, which remains in the testator after making a jointure. In this circumstance the case is new; and the circumstance, in which it is new, goes to exclude all pretence for an intention to revoke; for the

deed respects nothing but what is expressly reserved out of the will. It is so far from being inconsistent with the will, that the will and the subsequent deed amount in effect to one conveyance to the uses declared by that will and that subsequent conveyance. These cases, I have mentioned, were not denied at the Bar; nor was it insisted, that a mere alteration by a lease for life or years to a stranger would work a revocation. This must be remembered, when we come to talk of the least alteration making a revocation. How then is this will revoked? Not upon the ground of intent; for that is abandoned.

My Brother Adair stated it to be a positive rule of Law established by a series of decisions, that certain acts done by the testator would be a revocation, let the intent be what it might, and even against his manifest intent. To that proposition I entirely agree: but we must see, what those acts are. Every thing will not do that: a new estate, a new use, I admit, would. He stated, that the mere divesting the estate, whether it comes back or not, and though the testator is in again of the old use, that even taking back the estate through the channel of a trustee, would do it. To a certain extent I admit all this: but not, that the mere divesting the estate for a moment, where the party is in of the old use, will do it; though I think it was good law before the Statute of Uses: but when the Statute united the seisin to the use according to the quality of the use, that position could no longer be maintained. If the testator makes a feoffment in fee to a stranger, and the next minute takes back a fee by reconveyance, this would be changing the estate. That fee would not be the fee, that was devised; and the will may be said in an improper sense to be revoked. If he made a feoffment in fee to the use of himself and his heirs, or declaring no uses, before the Statute that use would not be the use devised; and so of the converse of that proposition. But the rule stands upon a much broader bottom than the momentary divesting the estate. The estate never comes back at all.

I can put a case, where the estate is divested for a considerable time, and the will is not revoked: where the testator is disseised, and remitted by re-entry. I am aware, the remitter is by act of law. Put the case, that the party disseised dies without having re-entered: the will is revoked (1); because he has not died seised; not because he intended to revoke it, or because the estate was divested, but because he did not revest it, and therefore did not die seised; and it is only in respect of that consequence, that in any case parting with the estate, independent of the intent, does amount [*670] to a revocation. To *maintain, that parting with the estate for a moment is a revocation, it is said, that he must continue to have the same estate from the time of making his will to his death. This proposition, to whatever extent it may be maintained, does not seem to me to advance the argument. It seems to

(1) *Post*, vol. viii. 282. See this case distinguished from the effect of bankruptcy; which does not work a revocation; *Charman v. Charman*, xiv. 580.

be the former proposition in other words ; if he parts with it for a moment, he does not continue to have it. There are not many possible cases, in which he can be said to die seised of an estate which he had parted with. The case of remitter is the only adjudged one, I know of ; which by a fiction of law turns upon this ; that it never was out of him ; and therefore he died seised. Alterations in many cases revoke a will, and because they show an intention to revoke. An alteration leaving only a reversion far removed by many intervening estates has shown a disposition in the testator not to let his will take effect ; and though there may be something of the old estate left, upon which the devise may by possibility operate, it is fair to conclude, he did not mean his will to have any effect at all. The ground is very different from that taken in the argument. It is not simply upon the alteration making a revocation by a mere arbitrary rule, but a solid, acknowledged principle of a presumed intention to revoke. Alteration of estate not powerful enough to raise an intention to revoke the will, but which does revoke it, brings us back to the ground we have trod. It must be that alteration, which shows, that the estate, of which the testator dies seised, is not that, which he had devised ; and that brings us back to the other principle, to which I have declared my assent ; that, the estate being gone, the will cannot operate. If the estate taken back is substantially a different estate, the will may be said to be revoked upon all the grounds ; it may be said, either that it is intended to be revoked, or that the old estate is gone, and by technical rules the will cannot operate upon the new estate acquired.

My brother Adair laid it down as a rule, that taking back the estate through the channel of a trustee altered the estate. Taken literally it is true ; and understanding it to be by reconveyance ; which is understood upon the passage in Co. Lit. (1) ; as it must be, because he speaks of its altering the course of descent : but if it is meant to extend to the use, which results upon the conveyance, it is begging the question ; and the proposition seems wholly inapplicable to a resulting use ; which is collateral to and arising out of the estate of the feoffor ; which is taken back by the Statute, and is as if never disposed of ; and, secondly, the use is not altered, by whatever channel it results. It is the old use, and when united to the seisin becomes the old estate ; and it is a contradiction in * terms, that the old use and the old estate are an altered [*671] use and an altered estate. I am showing, that there is no such positive rule, that every alteration, divesting and parting with the estate, shall be a revocation of a will. I admit, it is said in many cases, that there is such a rule : but where are the cases, from which it is drawn ? I can find no case determining that point : that every the least alteration, every divesting the estate, is a revocation. My apprehension is, that when a question arises upon an alteration of the estate working a revocation, there are certain principles which

govern the law, to which those several instances are to be referred, and upon which they are to be determined; and it is not enough to say, every one alteration shall be sufficient, without pointing out the principle, upon which that particular alteration shall amount to it. It is clear, if it shows, the intention is altered: so, if, though the intention is not altered, the same estate never got back again.

When we are trying cases by principles, the law of England is indeed a science: (a) but what shall we say, if it can be argued, that if the testator makes a lease for years or for life directly, the will is not revoked, but if he should unfortunately be advised to do the same thing by lease and release, it shall be revoked? Why? It shall because it shall! The rule is positive, and must not be examined. It must be shielded from examination and inquiry, because they would show the falsehood of it. The old law is adapted to the rule, that the testator must be seised of the same estate; and the necessary consequence is, that the will cannot operate upon the estate taken; as in the case of 44 Edw. III. which was an alienation and re-purchasing. The argument goes upon a refinement. They say, if it is intended to revoke, the will is revoked; and that all acts inconsistent with the will are a ground to infer an intention to revoke. All this is perfectly clear; and if the series of cases, the books are loaded with, had been brought to the test of this principle, we should not at this time have the misfortune to differ in opinion upon this point. But the principles are in the cases reported so confounded, that it is impossible to find out the principles; and it gives them the appearance of mere arbitrary decisions, which in truth they are not, if they are referred to their principles. The cases selected from the last in the books, would, if they were looked into, be a very good specimen of the whole. The early cases are clear and re-
[*672] ferable to principle. In the *modern cases they are all huddled together without reference to principle; and the principle cannot with any reasonable certainty be collected. It is necessary to take some notice of those cases.

The case 44 Edw. III. was mentioned by my Brother Heywood as the oldest case. I agree, that it is good law. I rely upon it as the main security of my argument. It is my polar star, guiding me to this conclusion, that if the testator dies seised of the same estate, he has neither aliened nor repurchased. *Winkfield's Case*, Godb. 132. From the conversation there stated the doubt seems to have been, whether so much of the land, whereof no livery was made, would pass by the will, or not. I collect, though it is not distinct, that the Judges were ultimately of opinion, that the land would not pass. The principle is not distinctly stated. Reduce the case to its principle, and it is very plain. The testator preferred, that the devisee should take the estate under the feoffment in preference to his will; or why did he propose a feoffment at all? The moment, he demonstrated that preference, the will was revoked upon the ground

(a) These words of Lord Chief Justice Eyre are worthy of remark, as evincing the spirit of a jurist.

of an implied intention. Apprehensive, that he might not live long enough to make livery, before he sealed the deed, he asked, if it would be any prejudice to his will : being answered, that it would not, he said, he would seal it ; for his intent was, that his will should stand. He certainly did mean, that his will should not stand, if he lived to make the feoffment. Those who were about him, gave him very bad advice. They thought, he might go on with the feoffment, and that his will would not be revoked. The law is in direct opposition to his wishes ; for having demonstrated his intention to revoke the will, it was revoked as to that part also, upon which he had only begun the feoffment. He did manifestly intend to revoke it, and to make terms with the law, which he could not make, that the will should not be revoked, till he had completed the feoffment. The act, he had begun, was in opposition to the will and to the operation of the will. When he had resolved, that the devisee should have the estate by another instrument, he did not intend, he should have it by the operation of the will. As to that part, with regard to which the feoffment was completed, he has revoked it upon both grounds : he intended to revoke it, and he had parted with the estate. The case of bargain and sale without enrolment proceeds exactly upon the same principle. That case and another case upon the effect of incomplete conveyances as revocations are in 1 Rolle's Ab. 615, pl. 5 & 6 ; and the ground is stated. The grant of the reversion upon an *estate for life where the lessee never [*673] attorns, is a revocation : Why ? not merely because it was an incomplete conveyance ; but because the testator has shown his intent, that another should have it, and has put it in the power of the lessee by attorning to complete the grant ; and the other case of bargain and sale without enrolment is said to be a revocation " for the cause aforesaid." This shows, upon what principle the revocation by these incomplete acts proceeds. It is not an arbitrary rule, but a clear, distinct principle, founded in good sense ; an act demonstrating an intention to revoke. I have dwelt the longer upon this case, because the principle of the case is perfectly clear ; and the case is an illustration of almost the whole doctrine of revocation.

The next is *Hussey's Case* in the Exchequer, Moor, 789, cited by my Brother Rooke. This case is a good illustration of the doctrine also. The feoffment revoked the will, because the testator parted with his estate. It is said to be against the intention of the testator, and is put as one of the strongest instances of the operation of the law upon the mere ground of alteration of the estate ; whereas, first, he intended it to pass, not by the will, but by the feoffment ; secondly, it was so altered, that according to all the rules it was absolutely impossible, the will could from that time operate as a conveyance of the estate. The reason is apparent : the testator did not die seized of it ; and yet it is extremely observable as to the doctrine of revocation, that this will was not revoked ultimately, though it could not take effect as a will ; for it was allowed to be a good declaration of the uses of the feoffment : but a revoked will is no will at

all. It shows extremely satisfactorily, in what sense the word "countermand" is there meant to be used. It is used in the same sense as Wentworth says "annulled." It was certainly a very particular case to have occurred; for the will was allowed to operate as a declaration of the uses of that very instrument, which prevented it from operating immediately upon the estate itself. The Court of Exchequer carried this odious doctrine of revocation no farther, than they were absolutely obliged to go.

Lutwich v. Mitton, 1 Roll. Ab. 614, 1 Bro. Ab. does not resemble the case in Moor in circumstances; yet it is referable to the same class of cases. I agree to the observation of my Brother Buller upon that part of the case, that seems to be admitted here, [*674] *and which was resolved there upon debate. There was a struggle for a relation back to the covenant to levy the fine: the Court thought, it could not be; and I am not called upon to debate that point; as I agree with the other Judges, that the articles are to be laid out of the case here.

Two other old cases were referred to in the argument: 1 Roll. Ab. tit. Devise, Q. Countermand, 615, pl. 1, 616, pl. 2. The first appears not to have been decided with the approbation of Popham, a very able Judge. It is this: a man devises land to J. S. and afterwards makes a feoffment to the use of himself in fee: though he has the same estate, yet it seems, this is a revocation. Two reasons are given for the judgment; that the intent was to have the estate by the new limitation; and that the feoffment passed the estate, and the Statute revests it in him; and so it is as a new purchase. I agree with Popham, that neither of these reasons is perfectly satisfactory. What is meant by the intention to have the old estate by the new limitation: or what consequence would it be of, if he had it not by the new limitation, but it was his old estate? Most clearly it is not as a new purchase. That point was decided over and over again, and so lately as in *Martin v. Strachan* was considered as settled by Lord Chief Justice Lee in that solemn judgment upon a special verdict. In the other case from Rolle, I confess, there was a new limitation; namely, the interposed estate to the wife for life. If any thing turns upon it, I am not called upon to debate it; for in our case there is no such limitation interposed. The same point is said to be adjudged in Cro. Car. 24: but another reason is given there: namely, because he parted with the whole estate. The ground of argument was shifted; I suppose, because the former ground was not satisfactory. But this latter reason is not more satisfactory: for I take it, he had not parted with the whole. In the first case the old use was not parted with; and in the second, part of the old use was not parted with. *Mountague v. Jefferies*, which is cited in those two cases, does not lay down an arbitrary rule, but refers it to the principle of the law of revocation, the intent. The principle is therefore right; though the application of the principle in those two particular instances may be deemed very erroneous.

Dister v. Dister, 3 Lev. 108, was also cited. In that case the

tenant in tail had, I take it for granted, the reversion in fee; and this was the estate, upon which the will was intended to operate: otherwise I do not see, what he could devise. If so it was the same as the subsequent case of *Marwood v. Turner*, 3 P. Will. 163. Then the effect of the recovery was absolutely to destroy that reversion in fee. This is proved by the well established difference between tenant in tail with reversion to himself in fee levying a fine and suffering a recovery. In the former instance he lets in the reversion and all the incumbrances of his ancestors: whereas by suffering a recovery he destroys the reversion and all the incumbrances upon it, and gains a new fee-simple to himself. It was therefore altered indeed. What the will was intended to operate upon was totally gone. The case of tenant in tail levying a fine only has not occurred: but here the reversion was totally destroyed; and a new fee-simple placed in the room of the estate-tail. Where all the estate is altered, I agree it is a revocation: but that the word "altered" has any force to revoke a will by its own necessary signification, going to every alteration, is a proposition, which, though generally stated, and, I admit, by many great men, certainly when brought to the test cannot upon their own principles stand. It must be an alteration, that of necessity is a revocation; *ex rei necessitate* revoking the will; as in *Galton v. Hancock*, 2 Atk. 425, where after a devise of an estate for lives the testator purchased the reversion in fee.

There are some older and some more modern cases upon the same principle: Roll. Ab. 616, tit. Devise: *Cestuy que use* before the statute of Hen. VIII. devises the use: then the statute unites the seisin to the use: the will is revoked: that is because the thing devised is gone: but the principle does not appear upon the book.

Then came the case of renewal of a lease; which is one of the points in *Marwood v. Turner*. The reason is obvious: the thing is destroyed; and he takes back a new interest. I cannot conceive, that this case has the most remote application to the present. The surrenderor means to part with what he has, and accepts an equivalent for it. This testator did not do that.

Then came *Lord Lincoln's Case*, 1 Eq. Ca. Ab. 411, Show. P. C. 154. That was determined by the greatest men in Westminster Hall against the wishes of every one; and the decision extorted by the *stubborn and inexorable rules of law. [*676] There is a good deal of perplexity in Shower's statement of part of the devise; and I think, it is not to be found in Eq. Ca. Ab.; therefore I suppose, it was not considered to be of much effect. The prayer of the bill is probably more correctly stated in Eq. Ca. Ab. It seems to be admitted on all sides, that it was a revocation at Law: the struggle was, whether it could be supported in Equity. The ground is stated very shortly, and indeed rather alluded to than stated: "For the reason the law goes upon in judging it a revocation, is, because the lease and release is a conveyance of the estate; and so *ex necessitate rei* a revocation." It did well enough for the

occasion ; and though the statement is loose, it is not far from being very precise and accurate. The words probably were meant to import, that in that particular case the deeds were such a conveyance, as *ex necessitate* would be a revocation. That proposition is true; and stands upon very solid grounds. There is no maxim better established, than that applications are necessary : if they were not, they would be capricious and arbitrary (1). Lord Lincoln converted his absolute fee-simple into a base fee. If that had determined by the marriage taking effect, the whole fee-simple would have been out of him forever ; and he never could have got it back again. If he died unmarried, he died only seised of a base fee. It was impossible therefore that he could die seised of his old estate ; therefore it is most true, that the deeds were a revocation. I am not inclined to dispute my Brother Buller's argument, that it depended upon the first limitation creating a base fee. With this explanation I agree, that will was revoked ; and upon the authority of that case I argue, that this will was not revoked. There is no such necessity here. Lord Lincoln did not die seised of his old estate : this testator did die so seised. There is nothing in the necessity of the case to prevent this will from operating. The difference between the two cases as to the base fee is, that in this case the base fee determined in the life-time of the testator ; and he was in effect according to the strict letter of the law remitted to his old estate. The substantial difference between the cases is, that here the whole effect of the lease and release respected the jointure only : whereas in the other it was intended to make a disposition of the whole fee. My opinion therefore does not interfere with that case : on the contrary, in my opinion, that case governs this.

In *Marwood v. Turner*, the argument for the revocation [* 677] is thus summed up : " With respect to the freehold estate, the common recovery and the deed, by which the premises were conveyed to trustees and their heirs, declaring the use of the recovery to Sir Henry Marwood and his heirs, these being all subsequent to the will, and inconsistent therewith, as declaring, the premises should go to his heir at law, and not to his devisee, it seemed to be not much opposed, but that the same were a revocation. Besides a common recovery, as it is a solemn conveyance upon record, and stronger than a feoffment, must needs be a revocation ; the recovery being suffered by the tenant in tail plainly gains an absolute fee derived out of that estate-tail ; and which fee was never devised : consequently, it must be even stronger than the case, where a man having lands devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, and though this be the old use and the old estate, yet according to the several cases in 1 Rolle's Abr. 614, tit. Devises Revoked, this is a revocation ; and the case in 3 Levinz. 108, *Dister v. Dister*, was cited as in the very point ; of which opinion was also the Lord

(1) *Wainwright v. Wainwright*, ante, 558, and the notes, 559, post, vol. iv. 52, v. 534.

Chancellor." What was that opinion, beyond the conclusion of the argument, that the will was revoked, I cannot collect. Some of the reasons given are very good: some are very bad. The recovery and the deeds declaring the uses being all subsequent to the will, and inconsistent therewith, as declaring, the premises should go to his heir at law, and not to his devisee, appears to me a very bad reason. They declare no such thing. That the recovery suffered by the tenant in tail gains an absolute fee derived out of that estate-tail, and which fee was never devised, is a very good reason, and the true one. That brings it within *Dister v. Dister*. Then the case is stated as stronger than a feoffment by the testator to the use of himself and his heirs made after the will. I cannot conceive, how it is stronger. It is neither stronger nor weaker.

Several other modern cases were cited for the Defendant as authorities applicable to these principles, or rather to establish the *dicta*, that are scattered through those cases in great profusion. I do not mean to controvert the decisions in any one of them, from *Lord Lincoln's Case* down to *Darley v. Darley*, 3 Wils. 6, and the case upon the will of the Duke of Chandos: but I may complain of the statement given in some of the reports of the reasons * of the judgment; which are sometimes so contradictory, [*678] that, not only the reasons of the judgments upon the same point are inconsistent with each other, but the reasons for the same judgment may be considered as the contradictory arguments of the same case *pro* and *con* at the Bar. I shall refer for this to *Sparrow v. Hardcastle*, Amb. 224. Undoubtedly that was rightly determined. In the first paragraph of the judgment it is laid down, that even the least alteration of the devisor's interest by any act of his makes it a different estate, shows a different intention, and is therefore an actual revocation unless in some special cases. In the next paragraph it is said, that if he does any intermediate act, from which it must necessarily be inferred, that his intention did not continue, it is a revocation. How little stress ought to be laid on these phrases, where the particular case in judgment does not turn upon circumstances precisely the same. As to the examples that follow, it cannot escape observation, that here is a heap of heterogeneous instances, depending upon different principles, huddled together without discrimination. If we refer them to the two paragraphs I have mentioned, they neither furnish the principle, nor are consistent with each other. The latter is the argument, that would have been used at the Bar to correct the falsehood of the former. These cases therefore are the materials of an edifice worthy of so eminent a builder of legal systems as Lord Hardwicke: but the cement is wanting. Probably the fault lay with the reporter from a desire of stating the ground of the judgment shortly. I cannot but suppose, that if we had Lord Hardwicke's own words, we should have had a very different account of it: not that every thing, he said, would be perfectly satisfactory. He has taken notice of *Parsons v. Freeman* in *Sparrow v. Hardcastle*, in which he had the au-

thority of his own great name opposed to him. The leading principle of that case is, that a conveyance for a special purpose with the limitations, that I originally mentioned, is not necessarily a revocation. In *Sparrow v. Hardcastle* Lord Hardwicke encounters this doctrine. He says, there is no case, which has the words "for a particular purpose" as the reason of the determination. There was his own authority in *Parsons v. Freeman*, if Atkyns reports it right. Both those determinations I think are right. The use, I make of them, is to furnish myself with an authority for so far abating from the excessive reverence to so great a name as Lord Hardwicke, which is too apt both to sanctify and perpetuate error, as to examine * the principles, and to narrow them to their proper extent, and not to extend the general expressions beyond their proper bounds, and that, to which they are meant to refer. Lord Hardwicke said, he was not concluded by his opinion in *Parsons v. Freeman*; because that was not the point in judgment. Following Lord Hardwicke, I feel, *haud passibus æquis*, I say, I am not concluded, there being no case upon the very point. I shall take some farther notice of *Parsons v. Freeman*, because it opens the Law of Revocation better than any modern case, and because it refers to *Tickner v. Tickner*; and then I shall conclude this tedious discussion: a discussion, by which I have almost exhausted myself, and I fear, tired the patience of those who hear me. I quote *Parsons v. Freeman* from Atkyns. Lord Hardwicke there says, "If the husband had been seised of the absolute legal estate at the time of making the will, and afterwards had suffered a recovery, and declared the uses to be such as he and his wife should appoint, this would have been a revocation."

My Brother Buller has stated some very solid reasons, why it would not be a revocation: but certainly Lord Hardwicke thought, it would, and upon that agreed to *Tickner v. Tickner*:

"The case of the feoffment, where the testator takes back the old use, is a prodigious strong case:"

Certainly, I agree, it cannot now be shaken: therefore I will not enter into it:

"That construction must arise from a presumed intention, that the testator would not have made a new conveyance without an intention to revoke his will:"

So they state it:

"But this must be understood with some restrictions and limitations. If the conveyance or recovery be for a particular purpose, then it shall revoke no farther than to answer that purpose; as where a testator creates an estate for years or for life in the lands devised, it shall operate no farther."

If we are to be tied down by these particular phrases, what do we say to this? If the whole estate is passed out of the testator, * but only for the purpose of creating a jointure, this is express, that it shall operate no farther. So, if we rely upon the mere literal expression, the case is determined upon

the authority of Lord Hardwicke; for a more particular purpose here is apparent:

"I am of opinion, that the same conveyance, which would be a revocation of a devise of a legal, will be equally a revocation of a devise of an equitable, estate: and it would be very dangerous to property, if it was otherwise. But still the same rule holds as at law: if for a particular purpose only, it shall be understood to be a revocation *pro tanto* only. In all the cases, where it is a conveyance of the whole estate in law, and is only meant for a security, the revocation shall only be for that particular purpose, to let in the incumbrance; for the testator himself has drawn the line, how far the revocation shall go; and his intention is plainly shown."

Contrast this with what Lord Hardwicke says in *Sparrow v. Hardcastle*; where he denies, that the case of a mortgage in fee turns upon the particular purpose; and says, it is, because in Equity the mortgage is only considered as a chattel-interest. But it seems the same in substance; though in the latter case he has taken great pains to deny, that it was ever understood, that the words "for a particular purpose," were ever used. In *Parsons v. Freeman*, we find that phrase in all parts of it:

"Mr. Freeman took a fee differently qualified, conveyed differently, disposable differently, and cannot be said to be only for a particular purpose; and therefore I am of opinion, the recovery is a revocation of the will."

Lord Hardwicke need not have said all this, if it was true, that every recovery divesting the estate was that alteration, that worked a revocation; he need not have shown that there were substantial alterations. In that case, I think, Lord Hardwicke has gone a great way towards putting the whole doctrine upon satisfactory grounds. His introduction shows, he thought it a harsh doctrine; and from the qualifications, he makes, he did not desire to extend it to all possible cases. It is admitted in this case, that the revocation does not proceed upon the ground of intent. It is clear, Lord

* Hardwicke did not conceive, it would apply to this [*681] case. He puts the case of an estate created only for years or for life; and he gives the reason, why the form of the conveyance should not affect the old use; "for that, is instrumental:" a reason, no man can answer. It would be strange, if the mere form, not operating upon the thing, should be turned against the parties, and made to have an effect, they never thought of.

There is a class of cases in equity; mortgages in fee and conveyances for payment of debts. Lord Hardwicke states expressly, that the same rule from the particular purpose holds as at law. Some notice is taken by him of *Tickner v. Tickner*; that in that case the conveyance was not merely to effectuate a partition, but was a new conveyance; which, he plainly means, had an effect beyond the partition. *Luther v. Kidby* and *Tickner v. Tickner* differed in one circumstance only: in the former the use of the moiety in severalty is immediately to the party in fee, and is a resulting use: in the latter

a new use according to appointment is interposed; and that, I observe, did extend over the whole fee. That, Lord Hardwicke thought, was a new conveyance, and beyond the particular purpose of partition. *Tickner v. Tickner* was clearly determined upon that ground, whether well or ill. It proceeds upon a distinction between that and the former case; and affirms the principle of the former; which must have been understood to be, that being for a particular purpose consistent with and not disturbing any part of the old use it was no revocation; though, the form being a fine and a deed to lead the uses, necessarily in form and operation it did deplete the estate of both the tenants in common. It divested it for a moment, but only for the purpose of vesting the respective moieties in severalty. At an early period, it appears, this case of partition had created some puzzle. It seems a stronger case than a feoffment by the testator to the use of him and his heirs; for it is in some respects a different estate. But fortunately in this instance common sense got the better of form. We have not the arguments of the Judges: but if Lord Hardwicke is right in saying, that a conveyance for a particular purpose is not a revocation *in toto*, we may presume, that was the principle; which is a solid principle. It had all the analogies of law to support it, and the authority of all the cases of partial revocation. They wisely determined, the purpose of the conveyance was every thing, the form nothing; and that there [* 682] was no difference in doing it by * deed of conveyance, and the way, in which the sheriff must have done it upon a writ. It is said to be an exception. In my apprehension the principle is a clear one; and that case is no exception, but depends upon the principle; which is universal; and it would be unjust to confine it to that case. If the least alteration, of which we have heard so much, does not work a revocation in that case, neither ought it in any, where the old use is left untouched. It ought to be considered as a leading, not an excepted and anomalous, case; and, as Lord Hardwicke once considered it, as a wholesome limitation of a doctrine, that had been carried to a most unreasonable extent upon the narrowest of all grounds. It is impossible to distinguish it from this case; and upon that authority, supported by that of Lord Hardwicke in *Parsons v. Freeman*, that a conveyance or recovery for a special purpose shall revoke no farther than to answer that purpose, I am of opinion, that the authorities will be better supported by declaring, that this conveyance is not a revocation as to the Swinford and South Kilworth estates, than by the contrary determination: but as my Brothers are of a contrary opinion, judgment must be for the Defendant.

Upon a writ of error in the Court of King's Bench this case was argued in Trinity Term, 1797, by *Williams*, Serjeant, for the lessor of the Plaintiff, and *Mr. Perceval* (a) for the Defendant; and in Michaelmas Term following, by *Mr. Balguy* for the lessor of the Plain-

(a) Afterwards Attorney General and Prime Minister. See *post*. 5 V. 870.

tiff, and Mr. *Gibbs* (a) for the Defendant. Immediately on the conclusion of the second argument, 10th November, 1797, the Court unanimously affirmed the judgment.

March 9th. The cause came on upon the Equity reserved.

Attorney General [Sir John Scott] for the Plaintiff. The question is, whether this Court can be called upon to execute the trusts of the will, as not revoked in equity? It will depend upon the ground of *Williams v. Owens*, ante, Vol. II. 595. Lord Chief Justice Eyre was of opinion, that if the intention of the conveyance was only for a particular purpose, the mode would not make it a revocation; and though a great number of the Judges are of a contrary opinion, yet as to the Swinford and South Kilworth estates, with respect * to which there is no doubt the settlement does not [* 683] vary from the articles, the will is not revoked in Equity upon the authority of *Williams v. Owens*. I also submit that case cannot stand, if this will is revoked as to the Stanford estate. The result of the judgment in that case is, that the articles created in the testator a sort of equitable interest; and the Master of the Rolls considers the will as disposing of that, and the conveyance therefore is not revoking the operation of the will. I must observe, as I did at the bar of the House of Lords, when arguing *Brydges v. The Duchess of Chandos* I found it my duty to contend, that *Williams v. Owens* was ill decided, that, with regard to the reversion in fee, it is impossible to say, the testator had an equitable interest in that reversion (1). The Master of the Rolls was of opinion, the purpose being only to clothe those equitable estates with the legal estate, the form being by a conveyance of the whole fee, that with regard to that reversion the effect of the articles in Equity was strong enough to control the revocation at law, which that conveyance would make as to the reversion in fee. The Chief Justice seems to think, that would also do at Law; the Master of the Rolls thought, it would not; but that it would in Equity. The same principle, that led him to think, the conveyance of the reversion would not revoke the will as to the reversion, must decide as to the Swinford and South Kilworth estates, that the conveyance made for the purpose of making a marriage agreement good would not disturb any legal interest conveyed for the purpose of creating that annuity; though the mode was that of conveying the whole estate. *Brydges v. The Duchess of Chandos* seems in some respects to have shaken *Williams v. Owens*; subject to this observation, which applies strongly to the Swinford and South Kilworth estates, that in *Brydges v. The Duchess of Chandos* the conveyance was in no respect an execution of the articles. As to the Stanford estates, the introductory words of the will are the same as if the testator had given them by the articles to his first and other sons in tail male: then he gives them to his daughters, then to the several other persons mentioned. The contingency may be fairly stated to include in it what

(a) For a sketch of his character see *post*, 6 V. 106.

(1) *Post*, vol. viii. 127.

amounts to an express devise, first to the sons, then to the daughters.

As to the objection, that the articles were not binding, if it is clear upon the face of the articles, the will, and the settlement taken together, that the testator by the will made in prospect of * that marriage, referred expressly to the interests given to his children and the jointure, and the settlement is expressly in pursuance of that agreement, then the articles, the will and the settlement, altogether ought to be considered as one act; and it must be held, that he considered himself as having contracted a binding obligation as to an event afterwards to take place. It is impossible to reconcile *Williams v. Owens* with *Brydges v. The Duchess of Chandos*.

LORD CHANCELLOR [LOUGHBOROUGH]. It is as impossible to reconcile *Williams v. Owens* with the opinion of the Lord Chief Justice in this case. The opinion of the Master of the Rolls and that of the Lord Chief Justice, though they both come to the same conclusion, that the will was not revoked, are directly opposite. In *Williams v. Owens* his Honor decided upon this ground; that, the marriage having followed, all the estates were turned into equitable estates. It rests solely upon that ground. Whether that is a construction, that can be supported, not being now reviewing that case, I will not presume to say: but that was the ground. The Lord Chief Justice thought, that the devise of the legal estate was not revoked; that the legal estate was not affected by the subsequent instrument; that the deviser had the same estate at the time of making the will and after the settlement was made. If that can be maintained, it is a ground for a writ of error.

Supposing it to be, as a great majority of the Judges have determined, a revocation at Law, upon grounds, that it would now be tedious to repeat, I cannot conceive, even admitting *Williams v. Owens* to be an authority, how I can hold it not a revocation in Equity; for they did not marry upon the articles. The marriage took place after the settlement. There was no change in the estate, the marriage not having taken place. The articles had no operation till the marriage. Before the marriage a settlement was made; which is an alteration of the estate from that, which the testator had at the time he devised.

I confess, I am bound by a great many prejudices in this cause. You may imagine the bent of my opinion. The opinion, I gave in the *Duchess of Chandos's Case*, confirmed in the House of Lords, goes so very near this. I am less likely than any one to say, this

Court can *ex arbitrio* hold, that any thing is a disposition [*685] by will, *which at law is not a disposition. *Williams v. Owens* upon the ground, on which it was decided, does not advance your argument at all. Therefore it is not necessary for me to canvass that case.

By the decree it was referred to the Master to inquire, whether any of the devised premises were not included in the settlement;

and if any, they were directed to be sold under the term of 500 years (1).

THE proceedings in this cause before the Court of Common Pleas, upon a trial at bar, in ejectment, under the direction of the Court of Chancery, are reported, as to the first argument, in 2 H. Bl. 576, and, as to the second argument, in 1 Bos. & Pul. 516. The judgment of the Court of Common Pleas was affirmed in the Court of King's Bench, upon writ of error, as reported in 7 T. R. 399. The decree made in the Court of Chancery was in conformity with the opinions of the two Courts of Common Law; and that decree was finally affirmed in the House of Lords, on the 5th of February, 1799. For a reference to other cases, establishing the same leading principle, with respect to revocations of wills, as that laid down in the present case, see, *ante*, the notes to *Brydges v. The Duchess of Chandos*, 2 V. 417: but that "necessary implication," as those words are technically used in legal phrase, do not imply absolute natural necessity, see note 3, to *Brummel v. Protheroe*, 3 V. 111.

EARL TEMPLE v. THE DUCHESS OF CHANDOS.

[1798, MARCH 13, 14.]

By a mortgage in fee of a devised estate or a conveyance in fee for payment of debts the will is revoked *pro tanto* only. (a)

UPON an appeal to the House of Lords from so much of the decree made in the cause of *Brydges v. The Duchess of Chandos* (reported *ante*, Vol. II. 417), as declared the will revoked by the subsequent settlement, of the 28th and 30th of October, 1780, the decree was affirmed upon the 20th of November, 1795.

Earl Temple having married the Plaintiff Lady Anna Eliza Brydges, the cause came on for farther directions upon the Master's report, under that part of the decree, by which it was referred to him to inquire and state, what manors, lands, and hereditaments, were conveyed by the deeds of the 7th and 8th of December, 1780: to whom, and for what estates, and upon what trusts; and which of the said hereditaments have been since sold; and whether all or any, and which, of the incumbrances thereby directed to be discharged have been satisfied; and when; and whether any and which of the said estates remain unsold; and whether any and what acts were done by the Duke touching any, and which, of the estates remaining unsold.

The report stated the articles, the will, the settlement, and the conveyance of the Somersetshire estates by lease and release, dated the 7th and 8th of December, 1790. By that conveyance, reciting the articles, and that no part of the 20,500*l.* therein mentioned to

(1) Upon appeal to the House of Lords the decree in this cause was affirmed on the 5th of February, 1799. See the next case, and the note, *ante*, vol. ii. 437, to *Brydges v. The Duchess of Chandos*.

(a) See *ante*, note (a) to *Brydges v. Chandos*, 2 V. 417, a case which is not easily reconciled with *Williams v. Owens*, 2 V. 595.

be due upon mortgage of the estates in the counties of Middlesex and Southampton had been paid, but the whole thereof [*686] remained due in manner *following: namely, 5500*l.* to Henry Hoare on mortgage of part of the Middlesex estate; 5000*l.* to him as executor of Christopher Arnold upon part of the Southampton estate; 4000*l.* to John Mount, and 5000*l.* to William Denne, upon mortgages of other parts of the estates in the same county; and reciting divers deeds and instruments, whereby it appeared, that 15,000*l.* stood charged upon divers of the said hereditaments in the county of Somerset, and was then due to Henry John Kearney; and that 6500*l.* was secured to Jacob Preston by mortgage of the manors of Stoke Rodney and Batcombe and other premises in the county of Somerset for 500 years, dated the 25th of March, 1774; but that 4000*l.* part of the said 6500*l.* had been paid; and that 4500*l.* stood secured upon a mortgage in fee of the manor of Keynsham and other premises in the county of Somerset, made by the Duke of Chandos by indentures of the 26th and 27th of July, 1780, to Thomas Morris Biggs; and that the farther sum of 500*l.* was due from the Duke to Biggs by a farther charge upon the same estates, made upon the 6th of December then instant; and reciting the settlement of October 1780, and the covenant therein contained for conveying the Somersetshire estates, upon trust to sell the same, and with the money arising from the sale to pay the mortgages upon the estates in the counties of Middlesex and Southampton, and all debts and incumbrances affecting the said hereditaments in the county of Somerset or any of them, and to pay the remainder of the money (if there shall be any) to the Duke of Chandos, his executors, administrators, or assigns; it was witnessed, that in pursuance of the covenant in the said articles of 1777, and the indentures of settlement of October, 1780, and for the more speedy discharge of the said incumbrances, &c. the said Duke and Duchess conveyed to trustees and their heirs the estates of Keynsham, Stoke Rodney, Batcombe, or elsewhere in the county of Somerset, to hold to them, their heirs and assigns, for ever; in trust with all convenient speed to make sale of and convey all the said manors &c. to any person or persons, his, her, or their heirs or assigns, either together or in parcels; and it was declared, that the trustees should stand possessed of the money to arise by sale of the said manors and premises, or any parts thereof, upon trust in the first place to pay off the discharge of the said sum of 15,000*l.* due to Kearney, 2500*l.* due to Preston, 4500*l.* and 500*l.* due to Biggs, and the interest of those sums respectively; and in the next place to pay off the said several sums of 5500*l.* 5000*l.* 4000*l.* and 6000*l.* charged upon the said estates in the counties of Middlesex and Southampton, due to Hoare, [*687] &c. and the *interest thereof respectively, and the costs relating to the trusts; and after the several payments aforesaid, in trust to apply and dispose of the surplus (if any) of the moneys to arise by such sale or sales as aforesaid, unto the said James,

Duke of Chandos, his executors, administrators, or assigns, for their own use and benefit.

The Master further stated by his report, that it was shewn him, that in pursuance of the said deeds the said county of Somerset, except the Keynsham estate, (now the Duchess of Chandos,) and except the Stoke Rochford estates, were sold; but those estates remained, that out of the moneys arising from the sale the sum remaining due to Jacob Preston was paid; and by indenture the 20th of November, 1784, he assigned the estates of Keynsham and Batcombe to Thomas Graham, his executors, administrators, or assigns, to hold to him, his executors, administrators, for the residue of the term of 500 years, in trust for the Duke of Chandos, his heirs and assigns for ever; and to be assigned of, as the Duke, his heirs and assigns, should direct; and that out of the money arising by the sale of the 2000*l.*, part of the 15,000*l.* due to Kearney, was paid in and out of indentures of lease and release, dated the 4th and 5th of October, 1785, reciting, that the Duke of Chandos was seised of the Keynsham estate, subject to a charge of 13,000*l.* the Duke assigned to the Duchess 12,000*l.* arrears of the annuity of 1500*l.* conveyed that estate to the use of the joint lives of the Duke and the Duchess: and if she should survive, to the use of the Duchess, her heirs and assigns, for the life of the Duke should survive, then, after the decease of the Duke, to the use of the Duchess, her heirs and assigns, in default of appointment, to the Duke, his heirs and assigns; and out of the said money due to Henry Hoare upon mortgage of part of the estates in the county of Southampton was paid; and by indentures of lease and release, dated the 28th and 29th of September, 1786, the said estates were reconveyed; and the said sums of 4500*l.* and 500*l.* secured to Henry Hoare on mortgage of the Keynsham estate in the county of Somerset were paid to him; and he by indentures of lease and release, dated the 28th and 29th of July, 1786, reconveyed the said estates to the use of the Duke of Chandos, his heirs and assigns; and that the sum of *5500*l.* secured to Henry Hoare on mortgage of part of the estates in the county of Middlesex was paid to his executors; and the estates of the said mortgage were reconveyed by indentures of lease and release, dated the 12th and 13th of September, 1786; and the sum of 4000*l.* secured to John Mount by mortgage of part of the estates in the county of Southampton was afterwards paid to him; and the said estates were reconveyed; and the sum of 6000*l.* secured to William Denne by mortgage of part of the estates in the county of Southampton was paid to him; and the said estates were reconveyed by lease and release, dated the 2d and 3d of November, 1787; and that by the means aforesaid the several mortgages and incumbrances, as well those affecting the estates in the county of Middlesex and Southampton as in the county of Somerset

charged, except the charge of 13,000*l.* to Kearney, subject to which the Keynsham estate in the county of Somerset was conveyed by the indentures of the 4th and 5th of September, 1785; and as to the said charge, by indentures, dated the 22d of May, 1787, in consideration of 10,000*l.* paid to the trustees, in whom the said charge of 13,000*l.* was become vested, by the trustees out of certain trust-moneys arising from property of the Duchess, the said charge of 13,000*l.* was assigned to the said last-mentioned trustees, in trust, as to 3000*l.*, part thereof, for the Duke of Chandos, his executors, administrators, and assigns; and as to the 10,000*l.*, residue thereof, for the purpose of securing to the said trustees the said 10,000*l.* so advanced by them; and afterwards by lease and release, dated the 7th and 8th of June, 1787, the Duke conveyed the Keynsham estate to the use of trustees, their heirs and assigns, during the joint lives of the Duke and Duchess, for the separate use of the Duchess; and by the said indenture the Duke also released and discharged the Keynsham estate from the said sum of 3000*l.*; and it was farther stated before the Master, that by lease and release, dated the 21st and 22d (1) of May, 1787, between the Duke, the Duchess, and her said trustees, the Duke, in consideration of 4493*l.* paid to him by the said trustees of the Duchess with her consent, conveyed the estate of Stoke Rodney; to hold to the said trustees, their heirs and assigns; subject to a proviso, that if the Duke, his heirs, executors, administrators, and assigns, should pay, &c. the said trustees would reconvey the said estate to the use of the Duke, his heirs and assigns, or to such other person or persons, as he or they should appoint.

Attorney General [Sir John Scott], *Solicitor General* [*689] [Sir John Mitford], * and Mr. Stanley, for the Plaintiffs.

The deeds of December 1780 are clearly a revocation of the will; turning the Somersetshire estate into personal property, and discharging it from dower, another provision being made for that; and so far from pursuing the articles, they are in direct contradiction to them. The estate was turned into personal property; and afterwards the Duke chose to convert it into real estate. He introduced a new incumbrance, not within the trust to sell for payment of debts. By the assignments, he took of the mortgages when paid off, in trust for himself and particularly as to Preston's mortgage, he has shown his will, that it should be real estate. The will therefore does not affect it; and the Plaintiff is entitled as heir.

Mr. Mansfield, for the Defendant, the Duchess of Chandos. The deeds of December 1780 did not convert these estates into personal property. It is nothing more than a conveyance for the purpose of paying debts in execution of the covenant. It cannot be doubted, that the Duke meant to execute the main part of the covenant in the articles; for the principal object was to raise money to disincumber the Somersetshire and the settled estates. For that purpose it

(1) *Quære* as to the date: see *ante*, vol. ii. 421.

was necessary to make a conveyance in fee, and to authorize the trustees to sell every part, if required. He directed them to pay the surplus money, if any, to him; conceiving that the provision in the articles, that he should make himself tenant in fee, was no longer to be attended to. The ground, upon which such cases as these are not held to revoke wills, is, that the conveyance is for a particular purpose, which the testator may at any time undo. He may pay the money, and get back the estate from the trustees; and they cannot refuse to convey. The Duchess therefore is entitled to take it as real estate. That will exclude the second question, whether the Duke had re-converted it into real estate. We are to contend, he did not.

Mr. *Graham* and Mr. *Thomson*, for the Defendant, were stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. It really comes to nothing more than that after the will the Duke has by different conveyances disclosed a purpose, and effectuated in part that purpose, to charge this estate to a certain extent. It struck me at first, when the instruments *were not so fully stated as [*690] they are now, that it was nothing more than making a mortgage of the estate. Nothing was declared as to that estate, which was conveyed to the Duchess. Therefore let the bill be dismissed as to the Keynsham and Stoke Rodney estates (1).

SEE, *ante*, the notes to S. C. 2 V. 417.

(1) The estate at Batcombe was included in the Stoke Rodney estate. See the note, *ante*, vol. ii. 437.

EATON v. LYON.

[ROLLS.—1798, MARCH 8, 9, 14.]

CONSTRUCTION of a covenant for a renewal.

Laches, [p. 690.]

Construction of covenants the same in equity as at law; but equity will relieve against a strict performance upon equitable circumstances, and no wilful default. (a) [p. 692.]

A legal instrument is not to be construed by the acts of the parties, (b) [p. 694.]

By indentures of lease, dated the 1st of May, 1766, in consideration of the surrender of a former lease, and of a new dwelling-house with other conveniences to be erected, a certain messuage with other premises in Cheshire was demised by George Hockenhull to Daniel and Stanley Orred, their heirs and assigns, to hold to them, their heirs, executors, administrators and assigns, for the natural and several life and lives of Elizabeth Orred, Helen Orred, and Joseph Jackson, and of the survivor of them, at the yearly rent of 10*l.*; with a covenant, that Daniel and Stanley Orred and the survivor, and the heirs, executors and administrators of such survivor, should and would within the space of six months next after the decease of any of the said three persons, for whose lives the said premises were

(a) If a condition or covenant was possible to be performed, there was an obligation on the party, by the Common Law, to perform it punctiliously. If he failed so to do, it was immaterial, whether the failure was by accident, mistake, fraud or negligence. In either case, his responsibility, dependent upon it, became absolute, and his rights dependent upon it, became forfeited or extinguished. 2 Story, Eq. Jur. § 1311. But Courts of Equity do not hold themselves bound by such rigid rules. Ibid. 1312. The general principle now adopted is, that whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. The true test, by which to ascertain if relief can be had in Equity, is, whether compensation can be made or not. If it cannot be made, Courts of Equity will not interfere. Ibid. § 1314. This doctrine has been applied to cases of leases, where a forfeiture of the estate, and an entry for the forfeiture, is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended as a mere security for the payment of the rent. Ibid. § 1315. The foundation of relief in these cases is that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that in justice he is entitled to. Ibid. § 1316. *Skinner v. Dayton*, 2 Johns. Ch. 535. But a distinction seems to prevail in Equity between penalties and forfeitures. In the latter, though compensation can be made, relief is not always given. Ibid. § 1320. *Livingston v. Tompkins*, 4 Johns. Ch. 431. The doctrine seems now established, in England, that, in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted, in Equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensation. Ibid. § 1323. *Amby v. Woodward*, 6 B. & C. 519; *Rede v. Farr*, 6 M. & S. 121; *Bowser v. Colby*, 1 Hare, Ch. 109. Perhaps the latter doctrine would be received in the United States with more hesitation. *Harris v. Troup*, 8 Paige, 425.

(b) *Quære*, whether this rule can be maintained. See *ante*, p. 294, note (b) to *Baynham v. Guy's Hospital*; and Hovenden's note, *post*, p. 696.

thereby granted, as aforesaid, give notice to the said George Hockenhull, his heirs and assigns, of the decease of such person or persons; and would within the farther space of six months surrender that demise, and accept of a new lease of all the said premises, and therein add one or two life or lives to the life or lives then in being, as the case should require; paying for the same unto the said George Hockenhull, his heirs and assigns, as followeth: that is to say; if but one life to be added, the sum of 5*l.* but if two lives were to be added, then the sum of 10*l.*; which said new lease should contain all the covenants and agreements, as were inserted and comprised in that grant or demise, and no other; and the said George Hockenhull for himself, his heirs and assigns, did covenant, promise, grant and agree, with the said Daniel Orred and Stanley Orred, their heirs, executors, administrators and assigns, that the said George Hockenhull, his heirs or assigns, would at the decease of any of the life or lives aforesaid at the request of the said Daniel Orred and Stanley Orred, or at the request of the survivor of them, or the heirs, executors, or assigns, of such survivor, grant a new lease of the said premises thereby demised, and add *one or [*691] more life or lives in the room of the life or lives so dying, for the considerations aforesaid; and that such new lease should contain all the covenants and agreements, as were mentioned and comprised in that present grant and demise, and no more.

Stanley Orred, having survived Daniel Orred, by his will, dated the 13th of September, 1770, gave all the demised premises to the only use and behoof of his sister Helen Orred, her heirs, executors, administrators and assigns, during his estate, term, and interest, therein. He died some time afterwards; and Helen Orred possessed the premises until her death in May 1787. In 1782, Elizabeth Orred died; and in December 1782, being within six months after her death, John Jackson by the direction of Helen Orred went to the house of Daniel Daulby for the purpose of giving notice of the death of Elizabeth Orred to John Hockenhull, who, as the bill stated, was then entitled to the reversion, and resided in the house of Daulby, and to apply for a fresh life to be added to the lease. Jackson did not see Hockenhull; being informed, that he was very ill in bed, and could not speak so as to be understood. Jackson did not desire Daulby to inform Hockenhull of his business. Hockenhull died upon the 20th of December, 1782. Helen Orred died upon the 30th of May, 1787, having by her will given the demised premises upon trust out of the yearly rents and profits to pay her debts and funeral expenses; and after payment thereof to apply the rents and profits to Rachael Jackson for life; and after her decease the testatrix gave the premises to Martha Jackson, her executors, administrators and assigns, for the remaining leaschold interest therein.

Upon the 16th of October, 1787, Rachael Jackson being dead, Martha Jackson caused a formal notice in writing to be delivered to Joseph Lyon in whom after the death of Hockenhull the reversion

became vested ; requiring him to grant a new lease for three new lives, or to supply the place of the two lives, that had dropped, by adding two new lives to the life in being ; and offering to pay the fine or fines required by the lease. No lease was granted upon that application. In October 1795, John Eaton, who was in possession of the premises as tenant, purchased Martha Jackson's interest for 150*l.* and he caused a lease to be prepared for three lives containing the same covenants and agreements as the old lease, and [* 692] requested Lyon to execute it ; offering to execute* a counter-part, and pay the 10*l.* This proposal being refused, the bill was filed.

The answer stated, that notice might have been given to Hockenhull by leaving it in writing, or by delivering it to Daulby or some of his family ; and that not being done is sufficient evidence, that Helen Orred abandoned any intention of having a renewal ; that some time before December 1782, Hockenhull had conveyed all his interest upon trust to sell ; so that the reversion was not in him at the time alleged ; and that the trustees conveyed to the Defendant in 1785. The Defendant insisted farther, that all the parties had notice of these circumstances and of his refusal to execute ; and he relied upon the length of time.

It was in evidence, that Helen Orred in the Summer of 1783, about six months after the death of Hockenhull, asked Wolstenholme, one of the trustees for the sale of the estate, whether he could not add a fresh life to the lease. He desired to see it ; and, after reading it, said, he could not tell. The Deponent, John Jackson, in or about July 1783, applied to George Travis, clerk, to ask his opinion respecting the renewal on behalf of Helen Orred. Travis, who was one of the executors of Hockenhull, said, he did not care to interfere about it ; and he thought, a renewal might be had after the death of the next surviving life, as well as then.

It was also proved, that the Plaintiff about twelve or fifteen years ago made several improvements and additions to the premises at his own cost to the amount of near 350*l.*

The cases cited were *Baynham v. Guy's Hospital*, *ante*, 295, and the cases there mentioned. *Allen v. Hilton*, 1 Fonb. Tr. Eq. 425, and *Bayly v. The Corporation of Leominster*, 3 Bro. C. C. 529, *ante*, Vol. I. 476 (1).

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. Two questions have been made in this case : first, as to the construction of the covenant : next, as to the performance of it. It is truly said, the construction of covenants is the same in Equity as at Law. I hope, I shall never see the time, in which a contrary doctrine can be held. But though the construction is the same, it is most certain, the performance may differ in the one Court from what it is in the other. At Law a covenant must be strictly and literally performed : in Equity it must be really and substantially performed according to

(1) See the note, *ante*, vol. i. 476.

the true intent and meaning of the parties, so far as circumstances will admit: but if by unavoidable accident, if by fraud, by *surprise, or ignorance not wilful (1), parties may have [* 693] been prevented from executing it literally, a Court of Equity will interfere; and upon compensation being made, the party having done every thing in his power, and being prevented by the means, I have alluded to, will give relief. It is true that has been formally carried to a length, that became in some degree alarming. They got into the habit of construing terms and conditions of covenants as being only *in terrorem*: but undoubtedly in modern times that has been much restrained; and it is now perfectly understood, that even in the purchase of an estate, if money has been covenanted to be paid at a given day, if it is not paid at the day, at law no action will lie; but if the party can show, that he took the means of paying it, and has been prevented by accidents not in his power, the Court will dispense with the strict performance of it; because, as it was formerly said, it is not of the essence of the contract: but it may be of the essence of the contract; and the party shall not avail himself of equitable circumstances, unless he shows, that there has been no wilful neglect or misconduct on his part.

The first question then is, what is the construction. That is a mere legal question: if doubtful, it is to be decided by a Court of Law. Therefore, I shall consider it, as if an action was brought in a Court of Law for a breach for not having given notice within six months after the death of the first life; and notwithstanding very able arguments on the part of the Plaintiff I feel no difficulty in saying that this covenant both with regard to the words and the natural meaning is, that notice must be given upon the expiration of the first life. Any other construction would strike out one half of it; for if it is an obligation upon the party to apply at the end of the first or second life, and if at the second he shall have the same or a greater benefit than if at the first, you may as well say, it may be at the end of the two first lives. But see, what are the words. I admit, the subsequent words may have given rise, as they certainly did in the minds of *some persons, perhaps lawyers, to a [* 694] misunderstanding: but there may be a case to satisfy them; namely, if a second life should drop within the twelve months after the expiration of the first. There is therefore a possible case, to which those words may apply. One of the Counsel did attempt to insist, that the word "any" grammatically means any two: that it is a plural word, unless the word "one" is added to it; and as an authority to prove that the language of the decrees of this Court is referred to: an authority, which Dr. Johnson would hardly have admitted: but even that is mistaken; for it is quite the reverse. If there are three executors, the language of the decree is to take an

(1) This was considered by Lord Erskine as too limited: *post, Sanders v. Pope*, vol. xii. 282: but that decision has been much shaken: see *Hill v. Barclay*, xvi. 402; xviii. 56; *Reynolds v. Pitt*, xix. 134: *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 24, and the note, *post*, vol. x. 70.

account of what has come to the hands of them or any of them, or (which is certainly a very incorrect expression) to their or any of their use ; the Master may under those words take an account of what has come to the hands of any one of them. The other Counsel admitted, that it is singular or plural according to the context ; and put it upon that ; whether it must not be considered in this case as a plural word. Upon the first part of this covenant I am of opinion, that if upon the death of the first life notice is not given, the covenant is not performed : but it is said what follows will control or rather enlarge the preceding part ; and the Court must conclude, the lessor meant to give an option to wait till the death of the second life. That would be a more absurd construction than the other. It is not a necessary implication most unquestionably. Common sense dictates the reverse. The lessor must be sure, he never would have a renewal at the end of one life. The rent is but 10*l.* a year. A great benefit, he is to derive, is the chance of 5*l.* upon renewal.

Let us see, what is their construction : though I disclaim, as I did upon a former occasion (1), and expressed my opinion of *Cooke v. Booth*, putting a construction from the acts of the parties. Helen Orred thought herself under some obligation to give notice of the expiration of the first life. I will not bind her by it, if it was not necessary. She might have found out afterwards, that it was not necessary, but that she did all, that was necessary, must be given up. She sent to the person, she thought the owner ; who was so ill, that he could not be seen : but there was no reason, why she should not have left the notice ; or given it to the person, who was entitled upon his death. She was bound so to do ; and if my construction [* 695] is the true one, she forfeited her right of renewal by not giving notice in a reasonable time after the death of Hockenhull. No formal notice was given to those, who survived him ; but two loose conversations are proved, in which she did make some inquiry about adding a life. All this makes against her ; for it shows her attention was called to it. She was content to take the opinions of the two persons mentioned in the evidence ; and forbore to prosecute her right to enforce the covenant as to the first life. In 1787 another life dropped. In the mean time another person succeeded to the reversion. Supposing there was no obligation upon the lessee to apply until after the death of the second life, then I will consider, whether what was done was sufficient to entitle Martha Jackson to a renewal. She then gave a formal and very proper notice to the Defendant ; saying, she was ready to accept a lease, and upon a lease being made to her to pay the fine or fines. It is said for the Defendant, and with a good deal of reason, it is not quite clear, that she did mean any thing more than to comply with her own covenant. I should not wish to hold parties to a strict performance : but she was very ill advised in resting upon this notice, though the Defendant said, he would not renew. Could she have

(1) *Ante*, 298 ; *post*, vol. xvi. 156.

brought an action? She ought to have tendered a lease. She took no farther step; and from that time until 1795 no steps were taken to compel performance. I cannot construe it any thing but an acquiescence in the refusal. It is said, it ought to be very favorably construed for the lessee; and her situation as a poor woman opposed to an opulent professional man, is urged as a reason why the Court should not look rigidly into her forbearance. I am disposed to think so: but coupling that with my opinion upon the construction of the covenant I am of opinion upon the whole, that enough has not been done to entitle the Plaintiff to a performance; that notice ought to have been given within a reasonable time after the lessee knew of the death of the first life; and the lessor had a right to it; but if not, he had a right after the death of the second; and after the lapse of time, that has taken place, and no tender made, the Plaintiff is not entitled.

The bill therefore must be dismissed. I decide this case upon the principles, on which Lord Thurlow decided *Bayley v. The Corporation of Leominster*; and I hope now, it will be known, that it is expected, these covenants shall be literally performed, where it *can be done; and that Equity will interpose, and go [*696] beyond the stipulations of the covenant at law, only where a literal performance has been prevented by the means, I have mentioned, and no injury is done to the lessor.

1. THAT a legal instrument is not to be construed by the equivocal acts of the parties thereto, and their understanding upon it, is well settled: *Baynham v. Guy's Hospital*, 3 Ves. 298; *Moore v. Foley*, 6 Ves. 238: such circumstances may, indeed, be stated, if a case is sent to a Court of Common Law, but then that statement will be accompanied with a caution, that no farther attention is to be given to it than as it can regularly be made legal evidence. *Iggulden v. May*, 9 Ves. 333.

2. In various cases of contracts and covenants, similar to that brought in question in the principal case, Courts of Equity are in the habit of relieving a party who has acted fairly, though negligently as to time, where time has not been made essential to the substance of the contract. *Lennox v. Napper*, 2 Sch. & Lef. 684. Time, however, may have so far entered into the essence of a contract, or covenant, that a Court of Equity will give no assistance to a party who has been guilty of gross laches. *Harrington v. Wheeler*, 4 Ves. 686; *Alley v. Deschamps*, 13 Ves. 228; *Hudson v. Bartram*, 3 Mad. 447; *Guest v. Homfray*, 5 Ves. 822; *Reynolds v. Nelson*, 6 Mad. 26; *Levy v. Lindo*, 3 Meriv. 84. And even where time has not been made essential to the very substance of a contract or covenant, and the breach, or delay, may admit of complete compensation, (*M'Alpine v. Swift*, 1 Ball & Bea. 293,) still, it seems now to be established doctrine, that relief ought not to be given, or specific performance decreed, where the breach of covenant, or the delay, has been wilful. *Hill v. Barclay*, 18 Ves. 63; *Lloyd v. Collet*, 4 Ves. 690 (in note). Lord Erskine, it is true, seems to have been of opinion that this rule would narrow the jurisdiction of Equity unnecessarily; (*Sanders v. Pope*, 12 Ves. 293;) but the authority of the case last cited, in which his Lordship expressed that opinion, has been very much shaken, if not entirely overruled. *Reynolds v. Pitt*, 19 Ves. 143; *White v. Warner*, 2 Meriv. 460; *Rolfe v. Harris*, 2 Price, 210 (in note); *Bracebridge v. Buckley*, 2 Price, 217.

3. The principle of the present case has recently undergone close investigation in the Court of Exchequer, when the grounds of Lord Alvanley's [ARDEN] judgment were approved, and acted upon. *Maxwell v. Ward*, 1 M'Clel. 465.

FORSTER v. HALE.

[ROLLS.—1798, FEB. 5, 8, 13, 17; MARCH 15.]

TRUST raised by implication from letters, and a paper, referred to by them, and in the hand-writing of the party, though not signed or dated, and by operation of law from advances of money.

The Statute of Frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it, (a) [p. 696.]

When letters are to raise a trust, there must be demonstration, that they relate to the subject, [p. 708.]

The Court has gone too far in taking cases out of the Statute of Frauds on the ground of part-performance of an agreement: the relief ought to have been confined to compensation, (b) [p. 713.]

IN 1790 Joseph Forster, Robert Rankin, William Kent, and John Burdon, carried on the business of bankers under the title of "The Commercial Bank at Newcastle." In June 1791, a lease of a colliery, called Hebburn, was granted by Henry Ellison to John Burdon and three other persons of the names of Peareth, Wade, and Wren, for a term of thirty-one years, as tenants in common, in equal fourth parts. Mr. Burdon died in December, 1792. The bill was filed by Forster and Rankin against the executors of Burdon praying, that it might be declared, that Burdon took and held the said fourth part of the colliery on account of himself and the Plaintiffs, and the Defendant Kent respectively in equal shares; and that the Defendants might be decreed to assign the same accordingly.

The circumstances, under which this relief was sought, as they appeared by the answers and the evidence, were these. The Plaintiffs and Kent resided at Newcastle. Burdon resided at Hard-

(a) Though there be no particular formal words requisite to create a trust, if the intention be clear, yet the English Statute of Frauds, 29 Char. II. cap. 3, § 7, 8, (and which is generally adopted throughout the United States,) requires the *declaration* or creation of trusts of lands to be manifested and proved by some writing signed by the party creating the trust. It is sufficient under the statute, if the terms of the trust can be duly ascertained by the writing. It need not be created by writing; but it must be evidenced by writing. 4 Kent, Com. 305, (5th ed.); *Leman v. Whitley*, 4 Russell, 423; *Fisher v. Fields*, 10 Johns. 495; *Steele v. Steele*, 5 Johns. Ch. 1; *Moran v. Hays*, 1 Ib. 339; *Rutledge v. Smith*, 1 McCord, Ch. 119; *Johnson v. Ronald*, 4 Munf. 77. In North Carolina, the law on this point is the same as the English law was before the Statute of Frauds, and parol declarations of trust are valid. *Foy v. Foy*, 2 Hayes, 131. It may be doubted whether the statute did not intend the *declaration* itself should be in writing; for the ninth section enacts, that "all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise"; but, whatever may have been the actual intention of the legislature, the construction put upon the clause in practice is now firmly established. And the trust may be manifested by any subsequent acknowledgment of the trustee, however informally or indirectly made, as by a letter under his hand, by his answer in chancery, or by a recital in a deed. The present case is a leading authority in support of this construction. See *Lewis, Trusts*, 30, ch. 4, § 2, pl. 2.

(b) The effect of part-performance in taking a case out of the Statute of Frauds. 2 Story, Eq. Jur. § 1522, 759, 760. See *ante*, p. 378, note (a) to *Wills v. Stradling*.

wicke in Durham about twenty-six miles from for several years before his death he had not left Bank was indebted to Burdon to the amount of ab which sum he had their note bearing interest, d July, 1792.

Several letters from Burdon to Kent were produced by the Plaintiffs, in order to raise a declaration of following passages :

Letter, dated the 9th of December, 1791. "M on Tuesday, that they would get the other engine week. He says, they are working in Wallsend (1 winning and within fifty yards of our barrier the coal, * that was ever seen: his own words: an of which will not make you regret the postage : scrawl."

Letter, dated the 18th of February, 1792. "In going very fast; and shall not live to hear you the coal in Hebburn; and only wish for your sake out."

Letter, dated the 17th of March, 1792. "My ar of H. C. arises entirely from the view of the co would attend the interest of the persons, with immediately concerned; for as to myself, I cannot see the issue of so important and weighty an affair."

It is usual for the owners of a new colliery in t of Newcastle to make a present of a piece of plate the ship, which carries to market the first cargo of colliery. Kent was owner of the ship in the coal t Burdon; and also had a share in a moiety of and the Tynemouth Castle. Burdon was owner of the that ship. In May 1792, Kent wrote to Burdon, his ship, the Burdon, might carry the first cargo from liery; to which request Burdon made the following the 10th of May, 1792:

"In a former letter you said, you hoped, the Bur the advantage generally given in such cases of carrying of Hebburn to market; from which remark I conclude your intention of putting up the Tynemouth Castle wise she certainly would be justly entitled to the such an occasion: but do not let us reckon our they are hatched; as the old proverb runs. Am account debtor for my moiety of the profits of t suppose, the sale is to take place? It is necessary these particulars, and also what you all wish with regard and payment of the money advanced by me to the can settle or sign a codicil to my present will."

The following proposal on a small piece of paper

(1) A colliery adjoining to Hebburn.

hand-writing, but not signed or dated, was proved by the Plaintiffs. It was entitled thus:

“The ship Tynemouth Castle Dr.”

An account is then stated with the ship; upon which Burdon states the value of his moiety at 1059*l*. At the bottom [*698] are the * words “Turn over;” and on the other side the proposal is stated, as follows:

“As Mr. Kent does not incline to put up the ship Tynemouth Castle to sale, or to dispose of his share of her, Mr. Burdon proposes, that the Bank in consideration of the sum of money advanced by him and now resting there (being paid by instalments) shall purchase his moiety of the said ship at the sum of 1059*l*. as mentioned on the other side; and which B. thinks highly reasonable; for as he lays his trustees under a stricture in one respect, he ought to relieve them in another by easing them of the trouble of examining the annual accounts of the said ship: especially as Mr. B. is willing to add a 1000*l*. of the purchase-money to the sum, he has already lent the Bank (the cash of which will only be reduced 59*l*.) and the share of each (paid by the Bank) amounts to the trifling sum of 250*l*.: besides this part of the ship ought to go with that of the colliery, should the latter succeed.”

Letter from Burdon to Kent, dated Sunday, 2 o'clock, stated in Kent's answer to have been received in June, 1792.

“I am induced to think, and always did, that your chief motive in purchasing the ship was to engage me with the proposal, I was so averse to, and which has been intended with such fatal consequences to me. Methinks after five years risk and no profits arising from such a concern you cannot be surprised at my desiring (and those after me) to be quit of it; though I am not willing to take less than 1000*l*. on the condition I mentioned; and this you may acquaint the other gentlemen with; and if they are not consenting, matters may then remain *in statu quo*; and I will allow and direct a year after my death for the repayment of the money advanced to the Bank agreeably to your own proposal. I always told you, the Spanish Closes (1) stood in a dangerous situation; and what is more, the extent of the ground is very trifling. Bigg's Main (2), at least some part of it, stands subject to the same danger. Indeed undertakings of this kind require a cool head, an equal temper, a good purse, a steady mind, and a firm resolution of going through all difficulties, which must naturally arise in works of such darkness, and such, which in all probability we shall meet with in Hebburn.”

Letter from Burdon to Kent, dated the 28th of June, 1792. “I beg, you will let me know by the newsmen on Saturday, [*699] * what the Bank finally determined upon relative to my share of the ship; as you never thought proper to give

(1) A colliery.

(2) A colliery.

me a decisive answer about it ; and the present critical situation of my health will not allow me any longer to defer executing a codicil to my will. They have only to say, whether they will accept of the share at 1000*l.* or my money to be paid in at twelve months after my death : a period, that will in all probability take place sooner than you seem to think."

Kent by his answer stated a positive agreement by him and the other partners in the Bank after several meetings upon the proposal of Burdon, that he should take his fourth share of the colliery for them all in equal shares ; and that he pressed them much to be concerned with him ; and declared, he would take it upon no other terms.

The Defendant Rowntree by his answer stated, that about August 1792 Burdon showed him the lease of the colliery ; and said, he had advanced and should advance a considerable sum for his fourth share of the expense towards winning the colliery ; and that the Bank owed him a very large sum of money ; and it was his intention to let the Plaintiffs and Kent have a share equal with himself in his fourth part ; but so as to secure to himself in the first place, not only what he had then advanced, and might afterwards advance for his proportion of the expense towards winning the colliery, with interest, but also the money, the Bank then owed him or might afterwards owe him upon his own private account, with interest. Burdon then gave directions to this Defendant, who acted as his attorney, to prepare a proper deed for the purpose of securing to each of them, the Plaintiffs and Kent, one fourth of Burdon's fourth of the colliery, subject as to the whole of the said fourth share, &c. (pursuing those directions). This Defendant prepared a draft of a deed ; whereby it was intended, that Burdon should declare, that the lease and agreement therein recited were taken and made in the names of Burdon, Peareth, Wade, and Wren, as to Burdon's fourth, in trust by mortgage or sale to raise a sufficient sum to discharge, &c. (pursuing the said directions) ; and subject thereto, in trust for Burdon and the Plaintiffs and Kent in equal shares. Rowntree sent the draft to Kent ; who returned it ; desiring, that after such alterations, as Rowntree might think necessary, it should be submitted to Burdon *for his inspection. About the 31st of August, [*700] 1792, Rowntree attended Burdon ; and showed him Kent's letters. Burdon said, he knew, they wanted him to give them a share in the colliery without any security for his money : but it should be made liable in the way, Rowntree should think right ; or otherwise they should have nothing to do with it ; or to that effect. Rowntree sent the draft again to Kent ; who returned it with a letter, dated the 21st of September, 1792, which after saying, that it had been considered very attentively by him and his partners, proceeds thus : "The only thing, that strikes us, is, what was talked over at Hardwicke the last time I saw you there : viz. that our shares would be re-conveyed to Mr. Burdon in trust as a security for what sums of money, he had advanced or may advance," &c. "if Mr.

Burdon's executors were not satisfied with the security, they might be for selling the part of the colliery to a disadvantage, and contrary to our inclination ; when by deferring it for some time it might turn out to profit, and enable us to pay it with satisfaction to ourselves. You will recollect, this matter was talked over with Mr. Burdon that morning ; and you will please to consider, if any clause can be inserted to prevent our being subjected to such an inconvenience ; as that seemed to meet with Mr. Burdon's wishes."

Rowntree in consequence of that letter attended Burdon, and finding him extremely ill ordered the draft to be engrossed, as prepared ; and upon the 24th of September, 1792, he wrote to Kent thus—" I have since considered what your letter suggested, as attentively as I am able : but as I do not see any other plan of making the security effectual, and I know, Mr. Burdon will rely on my framing it perfectly so, I have given it to the clerks for engrossment in its present shape. What Mr. Burdon hinted at, when I met you at Hardwicke, I should imagine, he will carefully attend to ; and therefore that security you must depend upon ; and if in the event of an accident to that gentleman you can, as you must undoubtedly be able to do, satisfy his executors as to the safety of the money, there will be little or no reason to apprehend, that they will sell his part in the colliery ; as they must be equally interested with the other partners in the Bank in the success of it. I really think you may rest very easy ; especially as the security is only similar to that of a mortgage of an estate ; which must in all cases be subject to a sale, if the money be in a precarious situation." Then after

[* 701] *expressing apprehensions as to Burdon's situation, he adds : " You, I should imagine, must know Dr. Clarke's sentiments. In that case, if they be very unfavorable, I wish you in confidence to tell me so by return of the post ; that I may get the deed, of which there will be four parts, finished and executed ; lest an accident should happen, and the parchment be useless." Upon the 28th of September, Kent wrote to Rowntree, that he was with Burdon on Sunday ; and mentioning his state of health added, that at his advanced age it was not to be expected, he could survive many years ; though not apprehended to be in immediate danger : and he desired to know, when the deeds would be ready for executing. Rowntree by his answer, dated the 3d of October, said, he thought, they would be finished on Friday or Saturday, so that he could attend at Hardwicke on that day or Monday, if he should hear from Kent, that Burdon would be well enough. Kent on the 6th of October wrote to Rowntree, that he should, if better, ride to Hardwicke against Sunday ; and might then have an opportunity to prevail upon Burdon to fix a day for Rowntree to be there to have the deeds executed, and should take care to give Rowntree timely notice. On the 8th of October Kent by another letter informed Rowntree, that he found Burdon very poorly, and he could not be prevailed upon to come out of his room ; that he (Kent) mentioned, that the assignments were ready ; and he thought, if Rowntree

would take a ride over some morning, Burdon would execute them. Rowntree went the next day; when Burdon asked if Kent had written to him: and being answered in the affirmative appeared much displeased; and refused to execute.

This Defendant Rowntree understood in all his conversations with Burdon, that the partners in the Bank were not interested with him, in the colliery; but that he was sole and absolute owner of his fourth share.

Wade's evidence was, that he proposed to Burdon to engage in the colliery; who was much pleased at it. The deponent never understood, Burdon was treating for any person but himself only as to this concern. The deponent being told by Wren in the spring of 1792, that the Plaintiff Forster asserted upon the Exchange, that he was a partner in the Hebburn colliery, asked Burdon about it; who was in a violent passion; and said, he had not any concern in it; and neither *he nor any of them had or [*702] ever should have, any concern therein; and that he would leave his share of the colliery to a gentleman, who would not give the deponent or his other partners any trouble; and he considered Forster as being a talkative, babbling, person. Burdon requested the deponent to use his interest with Peareth and Wren to appoint Kent the fitter of the colliery: giving as a reason, that he wished to assist the Bank to the utmost of his power; and by appointing Kent fitter the bills for the coals would pass through the Bank. Kent was appointed accordingly.

Burdon died without executing the deed; having by a codicil to his will, dated the 12th of June, 1792, directed, that the money, which might be due to him from the Bank at his decease, should be paid at four instalments of two, four, six, and eight years. By another codicil, dated the 3d of December, 1792, he appointed the Defendants Rowntree, Hale, Kent, and Chaloner his executors. He gave his share of the Tynemouth Castle to Kent.

The questions were, 1st, whether upon the letters of Mr. Burdon and the proposal in his hand-writing a trust was declared sufficiently within the Statute of Frauds (1); if not,

2dly, Whether a trust arose by operation of law upon various entries in the books of the Bank; which were read in evidence by consent. The colliery account was at first entered in the books under the title of "Burdon, Peareth, and Co.:" but that was afterwards altered; and the entries appeared under the head of "John Burdon's Colliery Account." Upon these entries it was contended by the Plaintiffs, that Burdon was debited with only one fourth of the expense in respect of the colliery, and the other partners in the Bank with the other three fourths: on the other side it was insisted, that they proved, that Burdon was charged with the whole expense. The first sums paid into the Bank, after an account was opened with the colliery, were 3000*l.* paid by Peareth, Wade, and Wren,

(1) 29 Char. II. c. 2, s. 7.

and 1000*l.* by Burdon; and the Bank was debited with the sum of 4000*l.* received on the colliery account. At Christmas, 1791, the Bank had paid out on account of the colliery the sum of 3998*l.* and a balance sheet was then signed by Burdon and the other partners in the Bank, striking the balance due from the colliery at 998*l.*; from which it was contended by the Plaintiffs, that the [*703] *sum of 1000*l.* was paid in by Burdon on his private account, in respect of which he received interest; and not on the colliery account, as was urged by the Defendants.

The books contained other entries of subsequent payments: and when Peareth, Wade, and Wren, paid in the sum on the colliery account, an entry was made of an equal sum upon the colliery account, divided into four shares among the partners in the Bank; each being debited with one fourth. It was also argued, from the entries in the books immediately preceding Burdon's death, that the Plaintiffs knew, they could not enforce the agreement.

Mr. *Grant*, Mr. *Steele*, and Mr. *Romilly*, for the Plaintiffs and the Defendant Kent, argued, that the letters of Burdon, and the proposal under his hand, amounted to a sufficient declaration of trust; and though the latter was not signed by him, they relied on his name appearing in it, and the reference to it by the letters, dated Sunday and the 28th of June; which were signed. They also contended, that a colliery was an article of trade; and therefore the agreement was not to be considered as an agreement concerning land.

Mr. *Lloyd*, Mr. *Richards*, and Mr. *Wear*, for the Defendants. *Tawney v Crowther*, 3 Bro. C. C. 161, 318, which has been cited for the Plaintiffs, proves that the Court has never deviated from the rule as to the Statute, that the terms of an agreement must be declared by a writing; and no parol evidence can be given as to what was or was not the terms of the agreement. If the rest is in writing, that is not sufficient; *Brodie v. St. Paul, ante*, Vol. I. 326. In *Tawney v. Crowther* there was no other transaction or agreement between the parties; therefore the letter could not be referred to any thing else. These parties had many other dealings. In *Stokes v. Moore* (before the Court of Exchequer) there cited, and in Mr. Cox's note, 1 P. Will. 771, an agreement begun and left unsigned was held not good. First, a signature is necessary: secondly, the terms must be in writing. There is no distinction between an agreement concerning a colliery and a lease of land. Have they read what amounts to a declaration of trust within the Statute, clearly referring to the lease of the colliery? Presumption will not do for them. Kent had a separate interest. All the letters [*704] are to him only: the names of the Plaintiffs never *occur in them. They may apply to the other transactions of these parties, or to the particular situation of Kent, as fitter. It is sufficient to say, it is extremely doubtful, to what they may refer. As to one letter, the expression "for your sakes" in the plural num-

ber, is relied on: but that is too slight a ground to determine upon against the Statute; and the other letters are too general.

As to the first letter, which says, the account will not make Kent regret the postage, surely, connected as they were as partners in the Bank, of which Burdon was the sole support, it was natural for Kent on that account, as well as from the interest, he was looking to as fitter, to feel satisfaction at that intelligence. *Lake v. Cradock*, 3 P. Will. 158, of which there is a better account in 1 Eq. Ca. Ab. 291, has no analogy to this. It was clear there, that it was a partnership: and each paid the consideration; though the conveyance was taken in the name of one only. I admit, Burdon had at some time an intention of letting in these persons upon some terms or other; and these letters might allude to conversations upon that subject: but that gratuitous intention afterwards revoked cannot be enforced after his death. The partners in the Bank acted upon that revocation; and state a different trust; to which they would not have submitted, if they had conceived, they could enforce their present claim. He clearly was not a trustee from the beginning of the concern; which was in October 1790; though the lease was not granted until June 1791. There is no trace of their interest for a year and a quarter after the undertaking commenced. If there was no trust at the commencement of the concern, it could not arise afterwards. Upon parts of these letters it would be very dangerous to raise a trust. The Statute was never intended to catch a man in that manner. It ought to be deliberate. It is clear from the will, that the treaty mentioned in the proposal went off: for he leaves his share of the ship to Kent; who accepted it. Lord Thurlow's expressions in *Tawney v. Crowther* show, he would not have thought these letters sufficient. There is no case, in which the Court upon this part of the Statute has ever held it a trust, unless, as Lord Thurlow says, there is no ambiguity in the terms of the contract; and they shall not be supplied by parol. It is said, it was kept a secret, that the Plaintiffs and Kent were concerned in the colliery, lest it should hurt their credit as bankers: but that reason applies still more strongly to Burdon; who was the support of the Bank.

* Upon the second point, a trust by operation of law is [* 705] never raised, except, where an estate is purchased by one man, and the money is paid by another. It is absolutely necessary, that there should be some consideration paid. They must show, that by the lease a trust arose by operation of law. That trust cannot be raised afterwards. 1 Eq. Ca. Ab. 380. *Riddle v. Emerson*, *Gascoigne v. Thwing*, 1 Vern. 108, 366. *Lloyd v. Spillet*, 2 Atk. 148. *Fordyce v. Willis*, 3 Bro. C. C. 579. *O'Hara v. O'Neil*, 2 Bro. P. C. 39, was a case of the grossest fraud possible.

Reply. It is not necessary, that the writing should declare all the terms of the trust. The controverted cases must always be of this sort: where the party without intending directly to declare a trust has furnished evidence against himself. *O'Hara v. O'Neil* was not a case of fraud. It was taken out of the statute by the evidence in

writing under the party's hand in the correspondence, that took place, coupled with the subsequent fact of the surrender of the old lease; and it is directly contrary to the argument, that there must be a plain declaration of trust. There are many cases in opposition to that doctrine. In *Bellamy v. Burrow*, For. 97, there was not a declaration of trust, but a promise to make such declaration; and it was to be upon such covenants as are proper and reasonable. In *Smith v. Wilkinson*, before the Lord Chancellor last Term, the Defendant had taken a conveyance of a lease of the tithes of Bray: a trust was alleged by the representatives of Mr. Wear; and it was made out by a letter; in which Wilkinson stated, that he had made an estimate of Wear's effects; and he stated the tithes of Bray among them; and valued them; the Lord Chancellor said, it was impossible to hear the Defendant after that letter. It is singular, that the style of these letters should be uniform; and that he should never have discovered any thing of that intention imputed to him, and treated it as a favor, he meant in future to do. The Defendant's construction is inconsistent with the whole turn of the correspondence. He certainly meant some present interest. It is not necessary, that the trust should arise, when the lease was taken. A declaration of trust evidenced by these letters will do. They furnish evidence in writing, that there must have been some agreement. In *Smith v. Wilkinson* it was impossible to prove, that it was taken as a trust; for the conveyance was absolute: but the letter at a subsequent period was sufficient. They ought to give evidence that it did not commence at such period. I admit, Kent's interest as fitter does create an ambiguity * upon the first letter; if that stood alone. Burdon had an idea, that the persons, with whom he was connected, were to have a benefit from it, after he should be dead. He was a perfect stranger to the other partners in the colliery; so much so that he did not himself apply to get Kent appointed fitter. If this is not a declaration of trust, it is a recognition of a trust; which is sufficient; and it is of a present existing trust; which is stronger than *Bellamy v. Burrow*; in which something more was to be done. His refusal to execute the deed in Rowntree's presence was only in ill humor, not from his considering himself not bound. His conduct with respect to the deed is to be taken coupled with the letters.

As to the trust by operation of law, the advance of money is evidence of the partnership; though the lease of the colliery may be taken in the name of one. Advances of money in equal shares and proportions upon a lease of land, where the lease is taken in the names of all, will turn the survivor into a trustee, and prevent survivorship: *Lyster v. Dolland*, ante, Vol. I. 434, 435 (1). This is stronger than the case of a farm put by Lord Thurlow there; for a

(1) See 2 Ves. 258; ante, *Morley v. Bird*, 628; post, *Jackson v. Jackson*, vol. vii. 535; ix. 591, and the note, 597; *Aveling v. Knife*, xix. 441.

colliery is not taken as land ; but has been considered both by Lord Hardwicke and the present Lord Chancellor as a mere trade.

March 15th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This cause was argued with great ability. I have taken a short time to consider it : but as this is a concern of great magnitude, it became necessary, I suppose, that it should be known who are entitled to it. After all the consideration I think it deserved, and after having endeavored to satisfy myself as to the real meaning of the entries in the books of this Company, which are not quite clear to a man not conversant in accounts of merchants, or of a banking-house, as this is, I have satisfied myself as to the result ; which is sufficient to determine the cause, so far as the accounts are necessary to the decision of it.

The circumstance, that no notice was taken of any persons concerned with Burdon in that share of the colliery demised to him, nor any notice or intimation given in his life to the partners in the colliery by those of the Bank, that they were as to his share partners with him, is certainly in favor of the Defendants : but it is insisted, that though their names do not appear upon the lease, nor that they publicly even by inquiry ever busied * themselves [*707] about the colliery ; yet in fact an agreement took place, that he should be trustee as to his fourth for them and himself in equal shares ; and they say, they can make it out satisfactorily to the Court, and within the Statute of Frauds ; and that, not by any formal declaration of trust, but by letters under his hand signed by him ; in which, as they allege, he admitted himself such trustee ; and that under the true meaning of the Statute it is sufficient, if it appears in writing under the hand of a person having a right to declare himself a trustee ; and that is equivalent to a formal declaration of trust. I am of that opinion certainly ; as far as the question arises upon the Statute. It was contended for the Defendants, that there is great danger in taking a declaration of trust arising from letters loosely speaking of trusts, which might or might not be actually and definitively settled between the parties, with such expressions as "our," "your," &c. intimating some intention of a trust ; that upon such grounds the Court may be called upon to execute the trust in a manner very different from that intended, and that it is absolutely necessary, that it should be clear from the declaration, what the nature of the trust is ; or it cannot be executed. That I certainly admit. The question therefore is, whether sufficient appears to prove, that Burdon did admit and acknowledge himself a trustee ; and whether the terms and conditions, upon which he was a trustee, sufficiently appear. I do not admit with the Defendants, that it is absolutely necessary, that he should have been a trustee from the first. It is not required by the Statute, that a trust should be created by a writing ; and the words of the Statute are very particular in the clause (1) respecting declarations of trust. It does

not by any means require, that all trusts shall be created only by writing; but that they shall be manifested and proved by writing; plainly meaning, that there should be evidence in writing, proving, there was such a trust. Therefore unquestionably it is not necessarily to be created by writing: but it must be evidenced by writing; and then the statute is complied with; and indeed the great danger of parol declarations, against which the Statute was intended to guard, is entirely taken away. I admit, it must be proved *in toto*; not only that there was a trust, but what it was.

The transaction depends upon these letters of Burdon, declaring, as the Plaintiffs say, that he was a trustee; together with another transaction, which is very material; that is, the preparation [*708] of a *deed by his direction, in order to have under his hand and in a more formal way a declaration of this trust. For the Plaintiffs and the Defendant Kent it is proved, that the directions for that purpose were given in August 1792; and the deed was fully prepared; and is given in evidence. Burdon is by that made to declare, not that in consideration of any new agreement then entered into and stipulations at that time made and to be performed, &c.; but the manner, in which this intention was carried into execution, was by the preparation of a deed, which reciting the lease declares, it was so granted, and an agreement for a farther lease made, to Burdon, Pearreth, Wade, and Wren, as to Burdon's fourth share upon the following trusts; that he should pay to himself all such sums of money, as he had already expended, or might hereafter expend; and also all such sums, as the Bank should owe him at his death; and subject thereto in trust for himself and his partners in the Bank. If this was a deed prepared in consideration of an agreement by that deed only to be carried into execution, the words are very extraordinary. "Whereas it is agreed," &c. "upon the following stipulations and covenants," would have been the natural way: but it is drawn otherwise; and I cannot see any *uim*, that purports, that it was a new agreement then entered into, except a stipulation, that all sums, which had been paid, or should hereafter be paid by Burdon, should be repaid. Stress was laid upon this; that Burdon had advanced sums of money out of his own pocket; which, it is said, could not be, if they were partners with him; for then they would have been called upon.

Great stress was laid upon the word "our" in the first of these letters. It was insisted, that it must necessarily mean some subject in which both the writer, and the person to whom the letter was addressed, were concerned: but I shall not presume that. It might be consistent, if he was partner with any one else. The latter part of that letter does give countenance to the argument of the Plaintiffs: but to that there is this answer; that Kent was the fitter employed by them; and consequently might be considered as having a considerable interest in the colliery; and whenever letters are to raise a trust, I shall expect demonstration, that they relate to the subject. Therefore, if it rested upon this letter alone, though the

construction is strong from those phrases, yet, being desirous not to stir one step out of the Statute, I could not have so construed it.

As to the next letter, dated the 18th of February, how * to interpret it to be any thing but a declaration, that he, [*709] and the person, to whom he writes, and some persons connected with him, have some interest in the colliery, I do not know. "We" would not apply to Kent as fitter. It was said, that by the words "we" and "your sakes" Burdon might mean Kent only as fitter, and the other three partners and his own executors as partners in the colliery. That would be very strained: and it is barely possible to give it such a meaning. But it is not necessary to decide upon those two letters. So rigidly should I adhere to the Statute, that I should expect something more.

The next letter was written in March 1792. It is not insinuated that H. Cy. means any thing else than the colliery. It could mean nothing else. It is impossible to strain the words in this letter to mean the persons, with whom Burdon was concerned in the colliery, only. It might possibly mean, that the interest, he took in the success of this, was in Kent's interest, as the fitter: but in suggesting that one is straining against one's better judgment; for his interest, as fitter, was precarious; depending upon the other three partners.

The letter dated Sunday, two o'clock, is very material; as it relates to another transaction; which coupled with the other letters prove, not only that by the words "we," &c. he meant the Bank, but also, if necessary, that they were to take in equal shares. That letter introduces a transaction, proved by parol, that Burdon and Kent were engaged as joint owners of a ship, called the Tynemouth Castle, and that Burdon was very desirous to sell his share. He proposed, that the Bank should purchase it; and what he states as the consequence of their refusal is very strong. He does not say in this letter nor in the proposal, that if they do not take his share in the ship, they shall have no share in the Hebburn colliery. If it was all in his power at that time, it would have been a natural thing to say, if they did not take his share in the ship, they should have no share in the colliery.

The letter of the 10th of May was also relied on, as showing, that they were partners in the colliery. There is no insinuation in that letter, that their refusal to accede to his proposal should have any effect upon their situation as to the Hebburn colliery.

* Then comes a most important piece of evidence; [*710] though it is not signed by the party: but it is evidenced under the authority of *Tauney v. Crowther*. If a man by irrefragible evidence proves himself a trustee, no doubt, a paper written in his own hand is evidence of the terms, if it is necessary to prove the terms. Observations were made upon this paper; that it had a very suspicious appearance; that it had no date, beginning, or ending; that there was no margin; and the paper appeared cut close to the writing: but luckily there are circumstances to prove, it is not mutilated. It is entitled "The Ship Tynemouth

Castle Debtor"; and at the bottom are the words "turn over"; all in his own hand; or I would not admit it. This shows, it is perfect. It is a computation of what he had expended upon the Tynemouth Castle; and he calculates, what he ought to receive from them. This is a most important paper; for it leaves no doubt as to his interest in the colliery and that of his partners in the Bank. It is said to amount to demonstration, that the real fact, he was pointing at, was that they were already partners in the colliery. He gives as a reason for wishing to sell it to them that this part of the ship and the colliery should go together. I profess, after considering this paper very fully, I cannot give any other interpretation to it than that contended for by the Plaintiffs; and if so, it is conclusive, that all the other expressions, he made use of, were applicable to the Bank; and that he was willing to sell his interest in the ship to them, because it ought to go to the owners of the colliery; and in this letter, though complaining of their refusal, and pressing them to take it, he does not threaten, that, if they do not, they shall have no share in the colliery: therefore it is a complete corroboration of the meaning imputed to the other letters; and clearly proves, that he did not then consider himself as having a right to refuse; which is one part of the case made by the Defendants, and attempted to be proved by the evidence of Rowntree.

By the letter dated the 28th of June, he means to say, the conduct of the Bank with respect to the ship would make some difference as to the money due from them to him. The threat is "or my money to be paid in at twelve months after my death." It appears upon the accounts, that calling it in would have been a very considerable distress to them. He was the great support of the house.

The money due to him amounted to 30,000*l*.

[* 711] *Thus closes the evidence under Burdon's hand. No more letters from him appear. Then comes the transaction of the orders given for preparing the declaration of trust. He was willing in consequence of the agreement, that the declaration should appear in a more formal way than by implication from letters. The deed does not state any agreement whatever, but the lease and the agreement for a farther lease; and proceeds to declare the trusts in the words, I have stated; which are very strong; for it was prepared by one of his executors. It is said very justly, what right had he to impose those terms? But it seems, that very thing did give rise to a remonstrance upon the part of the partners in the Bank against it, as going beyond what Burdon had a right to do; and a great deal arises upon the language of the letters exhibited by the Defendants, and proved by Rowntree to have been received by him from Kent. The end of Rowntree's letter of the 24th of September is very material; if any stress can be laid upon his evidence: not that I doubt it. He desires to be informed of Mr. Burdon's situation; "lest an accident should happen, and the parchment should be useless;" not lest they should lose the colliery. He reasons with them to show, that they would run no risk in executing

the deed with that clause, against which they remonstrated. In one of the letters to Rowntree, Kent observes, that the mode of making the security is by reconveying to Mr. Burdon their shares. These letters between Kent and Rowntree show, that it is no false inference, that there was an actual trust then subsisting; for in the whole transaction, except so far as Rowntree proves by parol, that he understood from Burdon, that he was not bound to let them into the partnership in the colliery, there is not a hint on the part of Burdon, that if they did not agree to his proposal, they should not be let in, nor any admission from them showing a doubt of their right, not as a new one, but as one, they had in possession. I cannot think, that under all these circumstances he was not a trustee. As to that provision in the deed, it does not appear, that he had a right to insert it: but it was worth their while to consent rather than dispute with his executors. I rely chiefly upon the letters of Burdon; and should have decided upon those alone, provided there was no other evidence to rebut it in the other parts of the case.

Then comes the question, why did they not advance money, as well as he, if they were jointly concerned? That fact would go a great way to diminish the force even of the letters. Each

*side says, the evidence is with them. The Plaintiffs [*712] undertake to show, they never did let him pay out of his own pocket the money advanced. That depends upon the entries in the bankers' books. I think, upon very attentively considering all these entries, the Plaintiffs are right in saying, Burdon never was debited for any sum of money advanced upon the colliery beyond his proportion of that share. It is very true, these books are not kept, as a plain man would have kept them. The reason of keeping the transaction a secret does not appear. There was some reason. All the time Burdon wrote to them, calling them his partners, he never said any thing to any other person. They chose to make an alteration in their books as to the colliery account; but there was no alteration in substance: it was only in the manner of the entry. They debit themselves with 4000*l.* received on account of the colliery. They received only 3000*l.* Some attempt was made to prove, that Burdon supplied the other 1000*l.* I do not quite understand that transaction. In the account, to which he himself was a party, for the balance sheet is signed by all the partners, 998*l.* is inserted as the balance due from the colliery: which could not be, if he had paid 1000*l.* The balance sheet therefore is evidence, that they had not debited him with that sum on the colliery account. I cannot attribute to them a fabrication of these entries; or suppose them so foolish as to think, that by entries in their books they could raise a trust for themselves. The entries were not concealed from Burdon. What I deduce from the books is, that Burdon never did pay out of his own pocket, that they never did charge his account with, or deduct interest for, more than his fourth part on account of this share of Hebburn colliery. This is a very strong corroboration of my opinion, that he was a trustee; and that

he has under his hand declared it; and one of the documents has proved, what would have been inferred from the general declaration, that it was in equal shares.

As to the point, whether such a trust can arise upon these documents under the Statute of Frauds, no man is more against straining it, than I am. I admit, my opinion is, that the Court has gone rather too far in permitting part-performance and other circumstances to take cases out of the Statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the [*713] contents of that agreement. * As to part-performance, it might be evidence of some agreement; but of what must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say, the Statute should not be an engine of fraud; therefore compensation would have been very proper. They have however gone farther; saying, it was clear, there was some agreement, and letting them prove it: but how does the circumstance of a man having laid out a great deal of money prove, that he is to have a lease for ninety-nine years? The common sense of the thing would have been to let them bring an action for the money. I should pause upon such a case. But this is not that sort of case. It is said, I must know the whole of the agreement, or I cannot execute any part. I think, I do know the whole of it. *Tawney v. Crowther*, *O'Hara v. O'Neil*, and other cases, are very strong authorities for raising trusts from letters. The former is not so strong for the Plaintiffs, as they think: but it is strong enough to show Lord Thurlow's opinion, if a trust was proved in writing, with regard to any other paper as to the terms. The Register's Book in the state of the case pretty nearly agrees with the report; and I have no doubt, his Lordship said, what is stated in the report. The doubt in the cause seems to have been, whether the letter referred sufficiently to the paper containing the terms; whether his word was, that he would execute his agreement. It is a little extraordinary; but the fact is, the decree was made by consent at last; which takes off from the authority (1). The cases quoted were chiefly, where trusts were raised from money advanced. This case does not admit of that. If any money was advanced as a fine, I

(1) Mr. Lloyd and other gentlemen at the Bar informed the Court, that, though the terms in that case were taken by consent, the point was adversely determined; upon which the Master of the Rolls admitted, the case was a strong authority. *Post*, *Seton v. Slade*, vol. vii. 265. A letter sufficient as an agreement within the Statute of Frauds, if the terms are specified, ix. 250; *Coles v. Trecothick*; *Forde v. Freeman*, ix. 351; *Rose v. Cunyngame*, *Huddleston v. Briscoe*, xi. 550, 583; *Halsry v. Grant*, xiii. 73; *Ogilvie v. Foljambe*, 3 Mer. 53; 2 Jac. & Walk. 426, 7, 8; *Gordon v. Trevelyan*, 1 Pri. 64; *Backhouse v. Mohun*, 3 Swanst. 434, n.: *Stratford v. Bosworth*, 2 Ves. & Bea. 341, 187. Whether a mere note in the third person, see *post*, *Morison v. Turnour*, vol. xviii. 175: but signature, either actual or, if that cannot be, by a mark, is absolutely requisite; *Selby v. Selby*, 3 Mer. 2.

should have expected them to contribute their shares : but no money was advanced in that way ; but only from time to time, as it was wanted. If it was proved, that the money was advanced by him, I should think it very strong ; but there is no proof of that. Therefore I am well warranted, without infringement upon any principle adopted as to the statute, in declaring, that Burdon was a trustee as to one fourth of the Hebburn colliery for himself and the other partners in the Bank (2).

1. THAT an acknowledgment by letter of a contract respecting real estate may be sufficient to satisfy the Statute of Frauds, see *Morison v. Turnour*, 18 Ves. 181; *Cook v. Tombs*, 2 Anstr. 426; *Western v. Russell*, 3 Ves. & Bea. 191. Where, however, a party seeks specific performance of an agreement, to prove the terms of which he relies upon letters, he is bound to show, in the correspondence, not merely a treaty — still less, a proposal — for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance which makes it no longer the act of one party, but of both. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument. *Kennedy v. Lee*, 3 Meriv. 451.

2. The case of *Tauney v. Crouther*, 3 Brown, 161, 319, which was adverted to both in the argument and decision of the principal case, was considered by Lord Redesdale (in *Chinan v. Cooke*, 1 Sch. & Lef. 34,) as of doubtful authority, and also as being inaccurately reported: his Lordship laid great stress upon the fact, as he understood it to be, that, in *Tauney v. Crouther*, Lord Thurlow gave the defendant his costs; but by Reg. Lib. A. 1790, fol. 561, it should appear that costs were given to the trustee only, and if so, Lord Redesdale's inference, that Lord Thurlow felt diffident of his opinion in that case, must fall, together with the premises upon which it was built.

3. That a lease, taken for the purpose of carrying on a trade, becomes, by operation of law, an incident of that trade, see, *ante*, note 2, to *Lyster v. Dolland*, 1 V. 431.

(1) This decree affirmed upon appeal to the Lord Chancellor, *post*, vol. v. 308, upon the points decided by the Master of the Rolls, but the Lord Chancellor was farther of opinion, that this case was not within the Statute of Frauds; the question being only as to the existence of a partnership in a colliery; and over-ruled an objection taken to the books and the letters of Kent and Rowntree as evidence. See *ante*, 38, the note upon the Statute of Frauds, to *Pym v. Blackburn*.

ATTORNEY GENERAL v. BOWYER.

[1798, MARCH 15, 16, 17.]

UPON a devise to a good charitable use the heir has no right to the rents and profits accrued, before the devise is carried into effect. (a)
 The general charitable purpose of the testator shall be executed upon the doctrine of *cy pres*, though the particular purpose fails, (b) [p. 714.]
 An account decreed and a receiver appointed upon the laches of the heirs, substituted by decree as trustees to execute a devise to charity, [p. 714.]
 Lands, originally held under old mortgages, pass by a general devise; though no release of the equity of redemption appears, (c) [p. 714.]
 Devise upon a future contingency; and no intermediate disposition of the rents and profits; a resulting trust for the heir, (d) [p. 725.]
 The jurisdiction of the Court of Chancery upon Informations for establishing charities arose since the reign of Elizabeth, (e) [p. 726.]
 Feoffment to the use of the poor generally is good, [p. 727.]

SIR GEORGE DOWNING being seised or entitled in fee-simple of and to divers freehold and copyhold estates in the counties of Cambridge, Bedford, and Suffolk, and being possessed of leasehold

(a) Equity favors charities to such an extent, that if lands are given to a corporation for any charitable uses, which the donor contemplates to last forever, the heir never can have the land back again. But if it should become impossible to execute the charity, as expressed, another similar charity will be substituted, so long as the corporation exists. *Attorney General v. Wilson*, 3 Mylne & K. 362; 2 Story, Eq. Jur. § 1177. And when the increased revenues of a charity extend beyond the original objects, the general rule, as to the application of such increased revenues, is, that they are not a resulting trust for the heirs at law; but they are to be applied to similar charitable purposes, and to the augmentation of the benefits of the charity. *Ibid.* § 1178, 1182. *Attorney General v. The Coopers' Co.* 3 Beavan, 29; *Attorney General v. The Drapers' Co.* 2 Ib. 508; *Attorney General v. The Iron Mongers' Co.* 2 Mylne & K. 576; S. C. 2 Beavan, 313; 1 Craig & Phillips, 220; *Attorney General v. Wilson*, 3 Mylne & C. 362.

(b) As to the doctrine of *cy pres*, see *ante*, p. 633, note (a) to *Attorney General v. Andrew*.

(c) An uninterrupted possession by the mortgagee for twenty years and upwards bars the equity of redemption. See *ante*, note (b) to *Edsell v. Buchanan*, 2 V. 83; 4 Kent, Com. 187-191, (5th ed.) Lands held by the testator as mortgagee will pass by general words in a will. See *ante*, p. 348, note (a) to *Leeds v. Munday*.

(d) Where there is a preceding estate limited, with an executory devise over of the real estate, the intermediate profits between the determination of the first estate, and the vesting of the limitation over, will go to the heir at law, if not otherwise appropriated by the will. 4 Kent, Com. 284, 307, (5th ed.) The same rule applies to an executory devise of the personal estate. *Ibid.* And, generally, if the trusts, by accident, or otherwise, fail, and do not take effect, or, if they are all accomplished, and do not exhaust the whole property, a resulting trust will arise, for the benefit of the grantor, or deviser and his heirs. 2 Story, Eq. Jur. § 1200, 1196a; *Stubbs v. Sargon*, 2 Keen, 255; *Ommancey v. Butcher*, 1 Turn. & Russ. 260; *Ward v. Cox*, 2 Mylne & C. 684; S. C. 1 Keen, 317. If profits are bequeathed, and the land left, in the mean time, to descend to the heir until the contingent limitation takes effect, and no other person made trustee of the profits, the heir becomes the trustee, and the rents and profits will accumulate in his hands for the benefit of the party under the will. *Rogers v. Ross*, 4 Johns. Ch. 388.

(e) The history of the law of charities prior to the Statute of 43d Elizabeth, ch. 4, which is emphatically called the Statute of Charitable Uses, is extremely obscure. Few traces remain of the exercise of this jurisdiction in any shape prior

premises in the same counties, which he held by leases for lives, or years determinable upon lives, or for years absolute, by his will, dated the 20th of December, 1717, having previously surrendered certain copyhold estates to the use thereof, gave all his manors, lands, tenements, and hereditaments, both freehold and copyhold, as well as leasehold for years, in the counties of Cambridge, Bedford, and Suffolk, and elsewhere, unto the Earls of Salisbury and Carlisle, Nicholas Lechmere, John Pedley, and Robert Pullyn, Esqrs., to hold the same unto them, and their heirs, executors, and administrators, according to the nature thereof, upon the trusts after declared: namely, as concerning such part, whereof the testator was seized of any estate of inheritance or freehold, to the use of Sir Jacob Garrard Downing for life: remainder to trustees to preserve contingent remainders: remainder to the use of his first and other sons successively in tail male; remainder to the second, third, fourth, fifth, and other sons of the testator's uncle Charles Downing successively in tail male; remainder to Thomas Barnardiston, son of the testator's aunt Barnardiston, and his first and other sons in the same manner; remainder to the second and other sons of his said aunt successively in tail male; with similar limitations in strict settlement to Charles Peters, and his first and other sons, and to his brother

to the statute. 2 Story, Eq. Jur. § 1142-1154, where the origin of this jurisdiction is traced. Mr. Justice Baldwin seems to have collected many cases antecedent to the statute, which may lead to some question, whether the origin commonly assigned to charitable uses is perfectly correct. Ibid. § 1143 note. Lord Redesdale has declared that the statute created no new law on the subject of charitable uses, but only a new machinery and ancillary jurisdiction. *Attorney General v. Mayor of Dublin*, 1 Bligh, 347. This view was adopted by Mr. Chancellor Walworth, 7 Paige, 80. Lord Chancellor Sugden has declared, after an analysis of the cases, that there was an inherent jurisdiction in chancery existing before, after, and at the time of the statute. *Incorporated Society v. Richards*, 1 Connor & Lawson, 58. As to the adoption of the statute in the United States, *Gas v. White*, 2 Dana, 170; *Sanderson v. White*, 18 Pick. 328; *Going v. Emery*, 16 Pick. 107; *Burbank v. Whitney*, 24 Pick. 153; *Gallegan v. Attorney General*, 3 Leigh, 450; 2 Kent, Com. 285-287 and notes; *Baptist Association v. Hart*, 4 Wheat. 39. In the latter case the Supreme Court of the United States arrived at the conclusion, upon a full survey of all the authorities, that charities, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, could be established by a Court of Equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the King as *Parens Patrie* before the statute of Elizabeth. And the whole subject has been again brought before the Supreme Court of the United States, in the discussion on Mr. Girard's will, and Mr. Justice Story, in delivering the opinion of the Court, has presented a luminous view of the origin and extent of this jurisdiction. *Vidal v. The Mayor of Philadelphia*, 2 Howard, —. See also in 1 Cooper's Public Records, the Calendar of the Proceedings in Chancery; also a learned discussion of the cases in *Burr v. Smith*, 7 Verm. 289; also, *Griffin v. Graham*, 1 Hawkes, 96; *Nash v. Morley*, 5 Beavan, 177.

In England the mode in which the establishment and administration of the charity is usually accomplished, is upon an information filed by the Attorney General *ex officio*, at the relation of some informant, upon which the Lord Chancellor acts generally in the same manner, and by the same proceedings, as he would upon a bill in chancery. The whole matter of charities has been regulated by recent statutes (52 Geo. III. ch. 101; 59 Geo. III. ch. 91) so that proceedings may now, in many cases, be had, to establish and execute them in a more brief and summary manner than formerly. 2 Story, Eq. Jur. § 1190, note.

John Peters, and his first and other sons, successively ; remainder to the use of the said trustees and their heirs ; in trust, that they should as soon as might be, out of the rents and profits of the premises purchase the inheritance and fee-simple of some piece of ground in Cambridge convenient for a College ; and should thereon build all such houses, edifices, and buildings, as should be fit for that purpose ; which should be called Downing College ; and he directed, that a charter should be sued for and obtained for founding such College and incorporating a body collegiate of that name within the University of Cambridge ; and that such College should consist of such Head or Governor, and of such scholars, members, and other persons, for the time being, and should be maintained, governed, and ordered by such laws, rules, and orders, and [* 715] in such manner, and therein should be professed * and taught such useful learning, as his said trustees and their heirs by and with the consent and approbation of the Archbishops of Canterbury and York, and the Masters of Saint John's College and Clare Hall in the said University in being at the time of founding the said College should prescribe, direct, and appoint ; and that immediately after founding and incorporating such College or Body Collegiate the trustees and their heirs should stand seised of all the said manors, lands, &c. in trust for the said Collegiate Body and their successors for ever.

And as and concerning the said manors, lands, and premises, wherein the testator was possessed of any estate for any term or terms of years, he declared and appointed, that the said trustees, their executors and administrators, should stand possessed thereof in trust from time to time to assign the same to such person or persons as should be entitled to the actual possession of his lands of inheritance by virtue of the limitations aforesaid ; and he gave all his goods and chattels to Sir Jacob Garrard Downing ; and appointed him executor. By a codicil to his will the testator gave some annuities, charged upon all his lands.

The testator died upon the 20th of June, 1749, without issue ; leaving Sir Jacob Garrard Downing, son of Charles Downing, his heir-at-law : who entered upon the freehold, copyhold, and leasehold, estates of the testator ; and enjoyed them till his death in 1764. He never had any issue, and Thomas Barnardiston, Charles Peters, and John Peters died in his life without having had any issue ; and there never was any other son of Charles Downing or of the testator's aunt Barnardiston. All the trustees died in the life of Sir George Downing.

Sir Jacob Garrard Downing by his will, dated the 12th of August, 1763, gave to his wife Dame Margaret Downing, charged with the payment of several annuities and legacies, all his manors, messuages, lands, tenements, and hereditaments, goods, chattels, and personal estate, to her, her heirs, executors, administrators, and assigns, for ever ; and appointed her sole executrix.

Sir Jacob Garrard Downing died without issue on the 6th of February, 1764 ; and his widow proved his will.

Lady Downing entered upon all the said freehold, leasehold, and copyhold estates devised by Sir George Downing. Upon the 9th of May, 1764, the information was filed against Lady Downing and the heirs-at-law of Sir Jacob Garrard Downing and the other proper parties ; praying, that the will of Sir George Downing might be established, and the trusts thereof carried into execution ;

* that an account might be taken of the money received [*716] by Lady Downing from the rents and profits of the said freehold, copyhold, and leasehold estates, become due after the death of Sir Jacob Garrard Downing ; and that a receiver might be appointed.

The cause was heard on the 19th and 27th of May, and the 11th of July, 1767, before the Lord Chancellor, assisted by the Master of the Rolls and Lord Chief Justice Wilmot ; who upon the 17th of June, 1768, declared their unanimous opinion, that the trusts of the charity in question ought to be carried into execution in case his Majesty should be pleased to grant his royal charter to incorporate the College, and his royal license for such incorporated College to take the devised premises in mortmain. The cause was farther heard upon the 31st of January, the 3d, 6th, and 9th of February, and the 3d of July, 1769, before the Lord Chancellor ; upon the last of which days his Lordship did declare and decree, that the will and codicil of the said testator Sir George Downing is well proved ; and the same ought to be established, and the trusts thereof performed and carried into execution ; particularly the trusts of the said charity, in case the King shall be pleased to grant his charter to incorporate the College and his royal license for such incorporated College to take the devised premises in mortmain ; and doth order and decree the same accordingly : and the Defendants, the heirs-at-law of the said testator, are to be at liberty to apply to the Court for that purpose ; and doth declare, that the freehold estates purchased by the said testator after the making of the said will did not pass by virtue of the codicil ; the will not being thereby republished ; and that the leases, which were renewed, or were run out, after the making of the will and before the testator's death, did not pass by the will, but fell into the residue of the said testator's personal estate ; and that the copyhold estates of the said testator not surrendered to the use of his will descended to his heir-at-law ; and doth likewise declare, that the annuities given by the said codicil ought to be satisfied in the first place out of the personal estate ; and that the real estate is only charged therewith, in case the personal estate is deficient, and doth order and decree, that it be referred to Mr. Lane, one of the Masters of this Court, to inquire what is * the annual value of the premises devised to the charity ; [*717] in order to enable the heirs-at-law of the said testator to form a judgment, what number of fellows and scholars can be maintained by the endowment ; and that they are to be at liberty to con-

tract for a piece of ground within the University of Cambridge, whereon to found the said College conditionally in case the charter and license shall be granted by the Crown; and it being suggested, that certain buildings on part of the devised premises are so constructed as to be movable from place to place, it is farther ordered, that the said Master do inquire, what is the nature of such buildings, and state the same with his opinion thereon and all circumstances relating thereto to the Court: and it is farther ordered, that the said Master do inquire into the state of the said testator's unredeemed mortgages at the time of his death, and state what he shall find concerning the same to the Court; and any directions touching the said inquiries were reserved until after the Master should have made his report thereon; and all parties were directed to produce upon oath all books, papers and writings to be examined upon interrogatories; and all parties were to be paid their costs out of the testator's real estate; and the consideration of all farther directions was reserved, until after the Master should have made his report, and any of the parties were to be at liberty to apply to the Court, as there should be occasion (1).

By indentures of lease and release, dated the 9th and 10th of November, 1768, being the settlement previous to the marriage of Lady Downing and Sir George Bowyer, all the freehold and leasehold estates of Lady Downing were conveyed to trustees and their heirs, and the sum of 93,000*l.* Reduced Bank Annuities and all other the personal estate of Lady Downing were assigned and transferred to the said trustees, upon trust after the marriage, as to 83,000*l.*, part of the said Bank Annuities, and the said freehold and leasehold estates, from time to time to transfer and convey the same according to the appointment of Lady Downing alone, and without Sir George Bowyer, by any deed or writing attested by two witnesses; and until such appointment, in trust for her sole and separate use; and upon farther trusts therein mentioned, in case of no appointment; and as to the jewels, rings, plate, pictures linen, household goods, and furniture, upon trust to permit Lady Downing to use and enjoy, and to give and dispose of, the same, as she should direct or appoint by writing under her hand, as if she was sole; and in default of, and as to such part, whereof there should be no gift or disposition, in trust for Lady Downing, her executors and administrators;

and as to all such moneys as should be recovered from the [* 718] *estate of Sir Jacob Garrard Downing, and as to all such other moneys, as were then due to Lady Downing, either in her own right, or which might become due, owing, or belong, to her, or to Sir George Bowyer in her right, and all other the personal estate last before mentioned, save the said jewels, rings, &c., upon trust as soon as conveniently might be after the same should come to their hands, to lay the same out in Government or real securities at the choice of Lady Downing alone, without her intended hus-

(1) Amb. 550, 571.

band, subject to the same trusts as the said 83,000*l.* Bank Annuities and the real and leasehold estates; and as to 10,000*l.* being the remainder of the said 93,000*l.* Reduced Bank Annuities, upon trust during the joint lives of Sir George Bowyer and Lady Downing to pay the dividends to Lady Downing for her separate use; and in case she should die, and Sir George Bowyer should survive her, to transfer the principal to him for his own use; and in case she should survive, to transfer the same to her.

The marriage took place. Lady Downing died in September 1778, having made her will duly executed, giving to her husband Sir George Bowyer, all her lands, manors, and tenements, in the county of Suffolk, and a legacy of 7000*l.* over and above what was settled upon him by marriage. Then after giving some houses to her niece Diana Say and several legacies she gave to Jacob John Whittington all the remainder of her personal estate, and likewise all her leasehold estates in the counties of Cambridge and Bedford, to him and his heirs for ever; and appointed him sole executor.

No proceedings were had under the decree, except that the costs were paid out of the rents and profits of the real estate, until the 18th of January, 1779; when a bill of revivor and supplement was filed, praying, that the Defendant Whittington might admit assets of Lady Downing to answer what was owing from her at her death in respect of the rents and profits of the estates in question, late the estates of Sir George Downing, or might account for her personal estate; and that the proceedings might be revived, and the decree carried into execution; and that the money, which should appear due from Lady Downing at her death, &c. should be paid by the Defendants, Whittington and the other legatees under her will, or out of the sum of 115,000*l.* Reduced Bank * An- [* 719] nuities, composed of the said 93,000*l.* and additional purchases made by Lady Downing, and also East India Bonds, vested in trustees.

An order of revivor was made in 1781; and there were several subsequent orders for the same purpose. The last was by a decree made at the Rolls upon the 16th of February, 1795; and upon the 18th an order was made for a separate report as to the annual value of the premises devised.

The Master by his separate report, dated the 1st of July, 1796, stated the several estates, and the rents, at which they were let, to the annual amount of 410*l.* 5*s.* 5*d.* and that all the said estates were devised in the charity, except one messuage with about 80 acres and 18 poles of land in the parish of Tadlow in the county of Cambridge, held under a lease from King's College; which having run out in the testator's life was not renewed until after his death; and therefore did not pass by his will; and he found, that the said 80 acres, &c. are in the occupation of William and Richard Lunnis and William Symonds: but no evidence had been laid before him, that enabled him to distinguish the particular lands, or the value thereof. In the schedule to his report the Master set forth the

rental of all the estates, including the said leasehold premises: the quantity and annual value whereof he conceived too trifling to interfere with the object of the inquiry. The Master farther stated, that the testator was seised and possessed of other estates in the county of Suffolk, now in the possession of Sir George Bowyer, the rental of which amounts to 474*l.* per annum; and that it appears by the examination of Sir George Bowyer and the answer of Lady Downing and the admission of the heir at law of the testator, that certain parts of the last-mentioned estates consist of freeholds purchased after the date of the will and of copyholds not surrendered to the use of the will, and which are declared by the decree not to have passed by it; and that it likewise appears from the examination of the Defendant Sir George Bowyer, that such freeholds and copyholds are so intermixed with other parts of the said estates, that he is incapable of distinguishing the same; he therefore finds himself unable at present to certify the annual value of such parts of the testator's estates in the county of Suffolk, as were devised, and passed by the will, to the charity.

[* 720] * An exception was taken by the Defendant Whittington to the report; for that the Master had included in his schedule of the estates devised to the charity certain estates at Gamlingay and Crawdon, being leasehold estates held for long terms of years, over which the testator had not a disposing power at the time of making his will; which appeared by the examination of the said Defendant Whittington and the state of facts laid before the Master by the relators and certain deeds produced before him.

An exception was also taken by Sir George Bowyer; for that the Master had included several estates in the county of Suffolk; which did not pass by the will of the testator; which appears by the examination and proceedings produced before the Master and by the report itself; whereas the Master ought to have distinguished the estates, which were devised by the will, and not included or in any manner intermixed the same with estates, that did not pass by the will.

Whittington's exception was over-ruled upon the 2d of November, 1796, without prejudice to any of the parties bringing before the Court hereafter the question, to whom the estates in Gamlingay and Crawdon belong. The other exception was also over-ruled.

The Master by his general report, dated the 11th of July, 1797, stated, that he found by the answer of Lady Downing, that, as the tenants required a number of new barns, &c., Sir Jacob Garrard Downing caused divers barns and out-houses to be erected: but with a view to transmit to his personal representatives the right to them he caused them to be erected on pattens or rollers, and not upon foundations fixed in the ground; Lady Downing therefore claimed liberty to remove them and to have a value set upon them for her benefit. The report stated, that such buildings were not fixed to the freehold.

As to the unredeemed mortgages the Master found one mortgage

in fee made to Sir George Downing, the father of the testator, by lease and release, dated the 30th and 31st of August, 1694 : a mortgage for 99 years made in 1688 ; assigned to Sir George Downing upon a farther advancement in 1709 : another mortgage for 800 years made in 1670, and another for 900 years made in 1697 ; both of which were assigned to Sir George Downing in 1709.

The Master found, that Lady Downing by her answer [721] stated, that she did not know, whether Sir George Downing was at the time of making his will in possession of the said mortgaged premises, or when he obtained possession ; and she did not know or believe, that the equity of redemption was released to Sir George Downing, the father, or to his son, Sir George Downing, the testator. The Master certified, that no evidence had been produced to show, that the equity of redemption in any of the mortgages was ever released to either of them ; and that he had taxed the costs, except those of the devisees of Lady Downing. The mortgages were for very inconsiderable sums.

By an order made on the 28th of July, 1797, the Master was ordered to tax the costs of the heirs at law of the several applications to the Crown for a charter and of contracting for a piece of ground in the University of Cambridge, as between attorney and client. Five applications to the Crown for a charter had failed. The decree was enrolled in 1771.

The cause came on for farther directions.

Mr. Mansfield, Mr. Lloyd, Mr. Graham, Mr. Fonblanque and Mr. Romilly, for the Relators, pressed for an account of the rents and profits against the Defendants, and for the appointment of a receiver ; observing, that every possible delay had been opposed to the execution of the trusts of this will ; particularly by the exceptions, by a groundless appeal to the Court of Delegates, and by a bill of review for error upon the face of the decree ; to which bill a demurrer was allowed.

The other directions prayed were, that the Defendants might lay a proposal before the Master for founding a College according to the will ; and a declaration as to the mortgages, that they passed by the will ; and as to the subsequent costs.

Mr. Piggott, Mr. Grant, Mr. Campbell, and Mr. Richards, for the Defendants. The decree was never understood to touch the intermediate rents and profits. Lord Thurlow in a cause upon the distribution of Lady Downing's assets made the distribution : being of opinion, that there was nothing in the decree in this cause, that affected her assets. They ought to have followed up the decree, and the application to the Crown. No duty was imposed by the * Court on the owners of this estate. The decree is [* 722] conditional ; that the trust shall be performed, in case his Majesty shall grant a charter and a license to hold in mortmain. It is a condition precedent. The foundation of the College was not the province of this Court ; which had only to decide the other question. The decree carefully leaves that to the Crown. The

Lord Chancellor could do no more than decide the question, whether the charity could take place according to law, if the Crown should think fit to grant a charter. The Court carefully excludes even the prejudice and influence, that would arise from going beyond their jurisdiction to give an opinion upon the policy of increasing the number of Colleges in the University. The Court has distinctly said, that none of these rents and profits can be applied, until the corporation exists: which according to the decision may take as by executory devise, when it exists. The decree negatives any claim to the rents and profits or any right to have them applied, and to dispossess the heirs at law, before the Crown gives existence to the corporation. If the charter is never obtained, their title will be complete. The words "as soon as may be" refer to the nature of the subject. Those words mean, as soon as there is some person natural or politic, which can take; as soon as the charter and license are obtained, and the corporation is created. The will has no general intention of charity. There is both locality and a name given by the testator; and the expression is "*such College*." There is no difference between a natural and a corporeal person taking an executory devise. *Hopkins v. Hopkins*, For. 44, and *Bullock v. Stones*, 2 Ves. 521, are authorities, that the rents and profits go to the heir at law, till the contingency happens: but if not, when the College is in existence, when the use is executed for them, then will be the time for them to assert their right to these by-gone rents and profits. The Information prayed a receiver and an account: neither was granted: though there had been five years' possession. That is not an omission in the decree: but the silence of the Court negatives the right of the Relators to the possession of the estate, and the acts of all the parties put the same construction upon it. The Court contemplated the possibility of its failing; and therefore did not intend to take any thing from the heir, until the corporation was created. If the want of a substitute for the trustees was the obstacle, that prevented the account, that obstacle was removed at the time of the second decree in 1769; when the heirs at law were substituted. The right then was the same as

[* 723] * now. They might have moved for a receiver at any time. They have acquiesced under the decree refusing them a receiver and an account for thirty years. They therefore cannot allege the length of time. Great part of the fund has now been expended by those, who had reason to suppose it their own.

It is still open to argue, that the object of this devise is so particular, that if it cannot be established, it is impossible to apply the principle of *cy pres*. In that respect it resembles *The Attorney General v. The Bishop of Oxford*, 1 Bro. C. C. 444, n.; and though that case ended by compromise, the principle was decided. The Bishop refused to let them build the church. The Master of the Rolls said, if they refused, he would give it to the next of kin. Then the Bishop, thinking he might make some terms advantageous for the parish, required enough to build a small chapel and to maintain

a chaplain, and agreed, that the next of kin should take the rest (1).

Reply. According to the decree it is impossible, that in any event, the assets received by these Defendants could belong to them. No doubt at the time of the decree it was considered, that the doctrine of *cy pres* would apply, whatever doubt has been thrown upon that doctrine since. How could it be imagined, that if by accident on one side or by artifice on the other the charter could be delayed, the trustees should get the rents and profits, not only from that particular charity, but from that object, to which by the law of this Court the fund would be applied. The decree establishes the will and all the trusts. It establishes the trust of the charity. That is said to be established conditionally; but it could not be otherwise. The trusts of the will could not be carried into execution according to the intent, unless the charter was obtained. An immediate application of the rents and profits could not be directed, while it was possible, the College never might exist; especially as it was the opinion of the Court, that if this charity could not take effect, the disposition should take effect for some other purpose. There was no conception of any difficulty in obtaining a charter. Lord Chief Justice Wilmut thought, it might be procured in six months. By the decree the heir was immediately at liberty to contract for a piece of ground conditionally. *From the death of [*724] the testator the whole fund was devoted to the charitable purpose. It is not an executory devise, but an immediate devise. There is not the least similitude between this case and *Hopkins v. Hopkins*. The defence amounts to this: that they may keep the rents and profits as long as they can throw difficulties in the way of the creation of that political person. That was the object of Sir George Bowyer's exception to the report upon the ground, that the estates were not distinguished; though he having the title-deeds was the only person, who could give the Master information upon it. So the appeal to the Court of Delegates could have no other object than delay. With the same view they filed a bill of review for error on the face of the decree; to which bill a demurrer was put in, and allowed. The words "as soon as may be" do not refer to the time necessary for obtaining the charter; as is suggested. If it was clear, that the rents would belong to the heir, until the charter was obtained, why did not the heir desire such a declaration? That would have been immediately refused. This is the naked case of an account against a trustee of rents and profits, to which he had no right.

LORD CHANCELLOR [LOUGHBOROUGH]. This is an application to me upon several different grounds on different branches of the case. The cause is set down for farther directions upon the report of the Master. The directions prayed are for liberty or an express direction and authority to the trustees, the heirs at law, the persons del-

(1) As to this case, see *The Attorney General v. Andrew*, ante, 633; post, vol. iv. 431, *Corbyn v. French*, where it is stated from the Register's Book.

egated by the Court to be active in the trust, to lay a proposal before the Master for a plan of a College. But little objection was taken to that in the argument; and it is very much of course in such a case: the Court having declared the will well proved; and that the trusts ought to be performed and carried into execution. The necessary consequence of such a decree is, that, when it is settled, as it came to be in this cause, who are to be active, it being a matter of doubt at the time, but the decree having fixed the heirs at law with it, that is, the heirs as they come into possession, the Master might, I think, have received a proposal without a direction; but I believe, in the Master's office the course is not to act without a specific direction. Therefore I have no difficulty in giving that direction.

The matter of farther directions also respects another part of the case; namely, the mortgages; which, except one, which [*725] is in *fee, are, according to such evidence as can now be found, long terms for years only; and it is stated by the answer of Lady Downing, that she does not believe, there ever was any release of the equity of redemption. Considering the length of time, I have no difficulty in holding, that they constitute part of his estate; and pass by his will.

The material question is upon the petition for the appointment of a receiver, and the account of the rents and profits. Those two points are in some degree connected together, but not necessarily connected; for there may be many cases, in which a receiver may be appointed, where the Court has not formed any decision, who are entitled to the rents and profits: but for the security of the fund, to protect the rights of the parties, and in order to be able to make that future decision, when those, who may be finally entitled, may be ascertained. But I wish to consider the claim set up on the part of the representatives of Lady Downing, who was the representative of Sir George Downing, to the intermediate rents and profits from the time of the death of Sir George Downing to such period of time, when there shall be an establishment of a College incorporated, when a license to hold in mortmain. That claim certainly is not founded in any express terms of the decree: at the same time there are no express words in the decree barring it. The point was not raised at the hearing. The Court has expressly pronounced no decree whatsoever upon it. Under these circumstances I must notwithstanding the length of time act, as if the decree had been a recent decree. The decree is to me a law. I cannot reason, whether it is proper or not. Whatever it might or ought to have been, it is to me imperative, final, and irreversible. All, I can do, is to apply the decree.

This leads me necessarily to consider, in what view the Court would have understood the claim; and whether, though it is not expressed in terms, the decree has not in effect disposed of that question. It is resembled to those cases, which are extremely familiar, where there is a devise to take effect at a remote period upon a contingency, and there is no intermediate disposition of the rents and

profits. This Court holds it a resulting trust for the heir. That is established by *Hopkins v. Hopkins*, followed by several other cases. Let us consider then, what would have been the argument with regard to this case, if this point had been stated and pressed upon the Court to obtain such a declaration on behalf of Lady Downing at the hearing. First, as to the legal right: it is perfectly established, that, though the object of the devise be to some future establishment of a use good in itself, the intermediate rents and profits *are not capable of being taken by the heir at law, standing in the place of his ancestor: but at law they are applicable to the use, if the use is a legal one. That is distinctly proved by *Porter's Case* and the case of *Sutton's Hospital*, 1 Bro. 16. 10 Co. 1. Therefore it is material to state, upon what ground they stand, and how far they affect it as at law.

Porter's Case was upon a devise before the Statute of Wills (1), and consequently before the Statute 43 Elizabeth (2). It does not appear, that this Court at that period had cognizance upon Informations for the establishment of charities. Prior to the time of Lord Ellesmere, as far as the tradition in times immediately following goes, there were no such Informations as this, upon which I am now sitting: but they made out the case as well as they could by law. It was a devise of houses, devisable by custom, being in London, to the testator's wife for life; upon condition to establish a charity; which required a license to alien in mortmain to the effect of substantiating the charity. Instead of performing the will she made a long lease; and the mode taken to effectuate the charity was this: they found the heir at law; and he having entered conveyed to the Queen; by which means she had it in her power to establish the charity. The clause was tried upon an ejectment brought by the heir upon the ground, that the wife by the lease had broken the condition. The defence was, that the condition was void; and therefore the estate of the wife absolute. The determination was, that the use was good; therefore the condition was good; and that the condition was broken, and therefore the heir had a right of entry; and the authorities referred to by Lord Coke, who argued it, are authorities from antecedent cases, in which this doctrine was established: that if a feoffment is made to a general, legal use, not a superstitious, not a bad use, but a legal, moral, and proper use, though indefinite, though no person is *in esse*, who could be the *cestuy que use*, yet the feoffment is good: and if it was bad, the heir *of the feoffor would have been entitled to enter; the legal [*726] estate remaining in him. Several instances were quoted of a general, indefinite, purpose; one from Bendloe; a feoffment to the use of the poor indefinitely. No use could be more general, or could less produce a certain person, to whose use it could be

(1) 32 Hen. VIII. c. 1; 34 Hen. VIII. c. 5. The will of Nicholas Gibson, the testator, in *Porter's Case*, was dated the 24th of September, 32 Hen. VIII.

(2) c. 4.

said to enure : but the Common Law held, that the use being good, the estate well passed : and there was no right in the heir of the feoffor. Therefore in the particular case, though no license to alien in mortmain was obtained, though the purpose could not be accomplished without that, the argument failed : the condition was a good condition ; and the right of the wife whose representative claimed, was held to be no right.

The same point in effect was determined in the case of *Sutton's Hospital* ; for Sutton had made the conveyance by bargain and sale without having obtained a previous license and a previous incorporation. The bargain and sale were antecedent. Therefore the argument was, that the heir at law of the bargainor was entitled to enter. He brought an ejectment ; and if the argument was well founded, that, because there was no estate, to which the bargain and sale could relate, it operated nothing, and was for an indefinite and general purpose, his entry was good. All the same species of objection have been urged here, as were the foundation of the argument in that case. It was held, that it was not void ; but was a good conveyance of the land. Though the corporation was not in existence, the purpose being good, the heir of the bargainor had no interest in the land.

Then how does this case stand, if those were good uses, and bargains and sales or feoffments to such uses would have taken the estate completely out of him, and so have barred the heir ? An appointment by will, if the purpose described by the will is good, is a good use at Common Law. If the trust is to be executed in this Court, this Court by the power, it has, and the jurisdiction over trusts, ought to prevent the heir at law from claiming any right. Upon looking at the decree the trust by the decree here is as emphatical a trust of the rents and profits as of the land, for the purpose, as soon as may be, of purchasing the ground and building upon it ; and part of the trust, which the Court has declared good, is to obtain a charter and license. The case would have been exactly the same, supposing, the devise had been to an existing College, but which had exhausted its license to hold in mortmain ; for until that license had been extended on the part of the Crown, the College having no power to hold * in mortmain could not have taken any legal interest in the land. It can hardly be imagined, that the rents and profits accruing between the death of the testator and the time, the right to hold in mortmain was *de facto* granted by the Crown, would go to the heir. I do not wonder, that no direction for an account or the appointment of a receiver was given at the time. Perhaps it occurred, that the parties might proceed more quickly without the appointment of a receiver. Taking with the knowledge of the trusts they would have been bound to apply the rents and profits (1). There was no imminent reason, that pressed for that direction at the time of the decree : but under the circumstances, if within a small period afterwards it had been suggested to the Court

as necessary and proper, I have no conception, that an application to the Court to appoint a receiver, to have the rents and profits made applicable, and to furnish those, who were to execute the trust, with the means of executing it, would have been refused. Considering the great authority, by whom that decree was made, it would be a singular indecency to suppose, that a defect was left in the decree on purpose to defeat what the Court thought themselves bound to establish in pronouncing the decree. Lord Camden in the judgment (1) he gave, stated, that *ex debito justitiæ* he was obliged to act; that the Court could not be passive. No reluctance was shown in making the decree: but it was as decisive and frank an opinion as could be given.

As to what was thrown out, that there are Colleges enough in Cambridge (2) the Court says the contrary. The Court has said, there is nothing in this devise that should prevent the execution of the particular purpose, if it was consistent with the pleasure of the King, that it should take effect; or if not, to defeat the general charitable purpose, that according to the judgment pronounced, *consistent with all the strong authorities that [* 729] were referred to, authorities down to the time of Lord Northington, who affirmed a decree of Sir Thomas Clarke, the Court is called upon to execute. I should take a very dangerous and a very improper latitude of opinion, if I let the ideas, that met with some degree of encouragement, not established by any precise decree of the Court, but rather applauded than established by any decision, that I am acquainted with, prevail against that opinion. The decree declares, that the trusts of the will ought to be performed and carried into execution: then the specific trust for the creation of the college is suspended, until the Crown thinks fit to grant the charter: but the language of the decree, and, if it wanted a comment, the judgment of every one of the Judges, shows, it is a good devise to charity. According to the will, the arguments of all the Judges, and the number of cases referred to, the right of the heir is totally gone. The decree has not said, that, the particular trust failing, the will is void. The King may appoint it to another purpose (3).

It will be necessary to give many particular directions as to the appointment of a receiver, also as to directing the account; for

(1) The Lord Chancellor during the argument read his note of the very able judgment pronounced by Lord Camden in this cause.

(2) It was said in the argument, that a new College is not within the proviso in the Act; and that Lord Northington had said, the Legislature intended to throw nothing in the way of devises to the Universities, or to Colleges already established there; meaning, that there should be no new establishment; but that the Colleges already there should be better endowed. The Lord Chancellor expressed his doubts of that distinction.

(3) As to the doctrine of *cy pres* with respect to charities, see *ante*, *The Attorney General v. Andrew*, 633, and the cases there referred to; and *Moggridge v. Thackwell*, 3 Bro. C. C. 517; *ante*, vol. i. 464; *post*, vol. vii. 36, and the notes, *ante*, vol. i. 469, 554.

though in positive right I am bound to say, these rents and profits do not belong to the persons, who have been in possession of them, and I am bound to call for the rents and profits, to take care of them, and in the case of a charity I cannot act upon the ground, that any person has been guilty of laches, nor give the advantage to the Defendants, that in other cases I should be urged to do, as the benefit from the length of time, &c. and though it has happened in many cases, that the Court has been obliged to follow the assets at great inconvenience and great hardship to the parties, as upon that singular will of Mr. Travers, when I was obliged to make a very harsh decree upon those, who held the assets for a long time, yet I wish, I could satisfy myself, that there was any shorter and more limited period, from which to date the account. I have found extreme difficulty in making it any thing less than the strict right calls upon me [*730] to do (1). Therefore I wish to *suspend that part of the decree; and without pronouncing the particular directions I will consider, what order I can frame for the appointment of a receiver, in which the directions must be special, and also for the account of the rents and profits.

Declare, that the trustees shall be at liberty to lay a plan before the Master for founding and establishing a College according to the directions of the will. Let the master consider of such plan; and report upon it. Let all parties have subsequent costs. Declare upon the mortgages, that they passed by the will (2).

[The present note properly relates also to the same case as reported, 5 Ves. 300, and 8 V. 256; also, to *Attorney General v. Vigor*, 8 V. 256; *Attorney General v. Whittington*, Ibid; *Attorney General v. Archbishop of Canterbury*, Ibid; *Attorney General v. Craven*, Ibid.]

1. ALL these suits arose out of the devise by Sir George Downing, for the foundation of a college (to be called by his name) in the University of Cambridge: the earlier proceedings, by which the trusts of the said will were established, and ordered to be carried into execution, are reported in Wilmet's Notes, 1, in Ambl. 550, 571, and in 1 Dick. 414.

2. Although a devise may have created a trust for the accumulation of rents and profits, yet if such accumulations are not disposed of, or in the events which happen, prove to be not well disposed of, they belong to the heir at law. *Stanley v. Stanley*, 16 Ves. 491.

3. As to the period when the Court of Chancery first exercised jurisdiction in the matter of charities, there seems to be a considerable discrepancy between the *dictum* in the principal case and that in *Eyre v. The Countess of Shaftesbury*, 2 P. Wms. 118; a distinction, however, by which they may be reconciled, is suggested in a note to 2 Hovenden on Frands, 288.

4. That a devise to a corporation, sole or aggregate, is not void merely because such corporation has not at the time received the sanction of the Crown, see *The Attorney General v. The Bishop of Chester*, 1 Br. 444.

5. As to the application of the doctrine of *cy pres* to charitable bequests, see, *ante*, note 3, to *The Attorney General v. The Haberdashers' Company*, 1 V. 225, and notes 4, 5, 6, to *Moggridge v. Thackwell*, 1 V. 464.

6. That, as a general rule, real and personal representatives of a person deceased, being equally volunteers, must take what they find in the condition in

(1) The Lord Chancellor during the argument intimated, that the account ought to be with interest and rests.

(2) *Post*, vol. v. 300; *Attorney General v. Vigor*, viii. 256.

which they find it, see *Oxenden v. Lord Crompton*, 2 Ves. Jun. 70; but, for a qualification of that general rule, see note 3 to *Ex parte Bromfield*, 1 V. 453.

7. Lord Hardwicke, according to the report of *Casborne v. Scisfe*, 1 Atk. 606, seems to have laid it down as a general position, that if a mortgagee in fee devise all his lands, the mortgaged lands will not pass, unless the equity of redemption has been foreclosed previously to the execution of the will: this opinion, however, if it really ever was so broadly expressed by his Lordship, (of which Lord Eldon has expressed great doubt,) is now restricted by the qualifications adverted to in the principal case, and expressly established by many other decisions, whereby it is settled, that a general devise will, commonly, pass an estate held on mortgage, or in trust, unless, from the words of the will, or from a disposition inconsistent with the limited nature of the devisor's right in such property, it can be collected that he did not mean to pass such estate. *Lord Braybrooke v. Inskip*, 8 Ves. 434, 436 (note 5, to which case see, post); *Ex parte Morgan*, 10 Ves. 103; *Ex parte Brettell*, 6 Ves. 578; *Wall v. Bright*, 1 Jac. & Walk. 498.

8. Lord Chancellor King long ago observed, that there can be no doubt but the legal estate in a mortgage in fee descends to the heir of the mortgagee, though it is as certain the money belongs to the executor; so that the heir is only his trustee. *Holcworth v. Lane*, Mosely, 198. But where the limitations of both real and personal estate unite in the same individual, it is competent to him to elect whether, between his own representatives, a mortgage, of which the equity of redemption is gone, shall devolve as real or as personal estate. Whether, in this and in analogous cases, an express declaration of intent is necessary, or whether it may be inferred from circumstances, see, ante, the notes to *Rashleigh v. Master*, 1 V. 201.

9. That a mere partition is no revocation of a previous devise; see note 3, to *Brydges v. The Duchess of Chandos*, 2 V. 417, and that a devisee may well devise land of which he is, at the time of making his will, disseised; provided he subsequently purges the disseisin by re-entry, see note 2, to the last cited case.

10. Lord Thurlow seems to have been of opinion, that an instrument which has been impeached in Equity, and ordered to be delivered up as having been improperly obtained, ought never to operate a revocation of a will. But, where the party executing such conveyance thought that his will was thereby revoked; and where a reconveyance would be necessary to remedy the fraud; Lord Alvanley [ARDEN] held, that the impeached instrument, though set aside and made ineffectual for other purposes, would still be a revocation: *Hawes v. Wyatt*, 2 Cox, 268; *S. C.* on appeal, 3 Br. 157; *Harwood v. Oglander*, 6 Ves. 215; *Ex parte The Earl of Ilchester*, 7 Ves. 374; and in the principal case, Lord Eldon seems to have inclined in favor of Lord Alvanley's doctrine.

11. That a previous surrender is no longer necessary, to give effect to a testamentary disposition of copyholds, see the statute 55 Geo. III. cap. 192.

12. According to the rules of Courts of Equity, a man may devise real estate for the acquisition of which he has entered into a binding contract; and such devise will not be revoked by a subsequent, unqualified, conveyance to the testator of the legal fee; note 3, to *Perry v. Philips*, 1 V. 251.

13. There have been great disputes as to what may properly be called lands "in settlement," and lands "out of settlement;" and it has been more than once determined, that lands, only mentioned in a settlement, are not to be called settled lands, unless the uses are declared in the settlement. *Bland v. Bland*, 2 Cox, 353.

14. That, as a general rule, a testator's meaning must be sought only in the words used by him, and interpreted according to their ordinary legal effect and operation, without venturing upon any conjectural exposition, see note 4, to *Blake v. Bunbury*, 1 V. 124.

15. Subsequent decisions have confirmed the rule laid down in the principal case, that the defendants in a charity suit cannot have the same benefit from length of time, or *laches* in calling them to account, which defendants in other cases might successfully contend for; there is no fixed limit within which an account against a trustee of a charity must be confined. The Statute of Limitations is not the invariable rule; and the result of the authorities is, that in each case the Court is bound to be guided by the particular circumstances. *Attorney General v. The Mayor of Exeter*, Jacob's Rep. 448; *Attorney General v. The Brewers' Company*, 1 Meriv. 498.

HOSTE v. PRATT.

[1798, MARCH 19.]

TRUST by will for all the children of A., when and as they shall severally attain sixteen; with a direction for maintenance: those born after the eldest attained sixteen were excluded: maintenance was directed without regard to the father's ability. (a)

JERMYN PRATT by his will, dated the 7th of September, 1791, after specifically devising certain freehold and copyhold estates, gave all other his freehold, copyhold, and leasehold estates, to his executors and their heirs, upon trust, as soon as conveniently could be after his decease, to sell the same; and the money to arise therefrom, as well as all other the money to arise from sale or otherwise of all his personal estate and effects, and the rents, issues, and profits of the real estates, directed to be sold, until sale thereof, he gave in manner following: first for paying all his debts and the charges of the execution of his will: then he charged all his personal estate with an annuity; and gave several legacies; and he gave all the residue of the moneys to arise from sale or otherwise of his said real and personal estate to his said trustees and executors, to hold to them, their executors and administrators, upon trust as soon as convenient after his decease, to place the said residue out upon good security, and to receive the interest and dividends, and pay, apply, and dispose of, the same or a sufficient part thereof for and towards the maintenance, education, support, and bringing up of all and every the children of Dixon Hoste by his present wife, until they shall severally and respectively attain their several and respective ages of sixteen years; and when and as the said children shall severally and respectively attain their said ages of sixteen years, in trust to pay, assign, transfer, and convey, all the said [*731] residue of his said estate and effects with the * interest, dividends, and produce, thereof, as should not have been applied for and towards the maintenance and education of the said children, as aforesaid, equally to and among all the said children of the said Dixon Hoste and Margaret his present wife, when and as they shall severally and respectively attain their said ages of sixteen years; and in case only one of the said children shall live to attain his or her age of sixteen years, then in trust to pay, assign, transfer, and convey all the said residue, and the interest, dividends, and produce thereof, or such part thereof as shall remain unapplied, as aforesaid, unto such only child: but in case any or either of the said children shall happen to die under age, leaving issue of his, her, or

(a) A legacy given to a class of individuals will go to all who answer the description at the time the gift shall take effect. See *ante*, note (b) to *Hill v. Chapman*, 1 V. 405. See also, *Draoes v. Howard*, 4 Mass. 97; *Fitzgerald v. Jones*, 1 Munf. 150; *Whipple v. Dow*, 2 Mass. 419; *Ewing v. Ewing*, 2 Dessaus. 451. This is one of the excepted cases, where maintenance is decreed, as it would be a hardship upon the father not to allow it. 2 Roper, Legacies, by White, 218, ch. 20, § 7; *post*, note (a) to *Brown v. Casamajor*, 4 V. 496.

their body or bodies lawfully begotten, then in trust to pay, &c. the part or share of such deceased child or children unto such, his, her, or their issue, share and share alike, (if more than one), when and as often as they shall severally and respectively attain their several and respective ages of sixteen years; and to pay the interest, dividends, and produce, thereof in the mean time to the said Dixon Hoste and Margaret, his present wife, for their respective maintenance and education: but in case all and every of the said children shall happen to die under age, and without leaving issue, then in trust to pay, &c. the said residue and the interest, dividends, and produce thereof, or such part thereof, as shall remain unapplied as aforesaid, unto the said Margaret Hoste, her executors and administrators.

The testator died upon the 11th of October following.

The bill was filed on behalf of William, Charles, and James Hoste, three of the infant children of Dixon and Margaret Hoste; and by the decree made on the 17th July, 1795, the will was established; and the necessary accounts were directed; and the Master was directed to inquire, what children of Dixon and Margaret Hoste were living at the death of the testator: if any were born since: whether any, and which, had attained the age of sixteen: if any are dead; and at what age they died; and whether they left any and what issue; and whether Dixon Hoste, the father of the Plaintiffs, is of ability to maintain them and the Defendant Sarah Hoste (they being then under the age of sixteen); and if not, what was proper to be allowed for maintenance and education.

* The report stated, that there were nine children; viz. [* 732] Marianne, born in 1776, who died in the life of the testator; Margaret Catherine, born in 1778: Theodore, born in 1779: William, in 1780: George, in 1786: James, in 1791: all born before the death of the testator: those born after his death were Jane Sarah, born in 1792: Thomas, in 1794: and Charles, in 1796.

The report stated, that all these children except Marianne are still living; and it was admitted, that Dixon Hoste, the father, had a clear income of 987*l.* 6*s.* 6*d.* a-year.

The cause coming on for farther directions, two questions arose: first, whether all, or which, of these children, were entitled: secondly, whether an allowance should be made for maintenance.

Attorney General [Sir John Scott], Mr. Graham, Mr. Cox, and Mr. Steele, for the children living, when the eldest attained the age of sixteen, contended, that they only were entitled; the children born after that period being excluded upon *Devisme v. Mello*, 1 Bro. C. C. 537. *Andrews v. Partington*, *Pulsford v. Hunter*, 3 Bro. C. C. 401, 416; *Prescott v. Long*, ante, Vol. II. 690, and a late case before the Master of the Rolls, *Kynaston v. Clarke*; all following the principle of *Ellison v. Airey*, 1 Ves. 111; that if the testator has appointed any time subsequent to his death fixing the share, each is to take, that necessarily excludes those born after that time (1).

(1) The other cases, in which this rule prevailed, are collected by Mr. Saunders, in his note upon *Heathe v. Heathe*, 2 Atk. 122. *Ld. Thurlow* in the cases before

Mr. *Stanley*, for the children born since the eldest attained the age of sixteen years, admitted, that upon the authorities decided, he could not support their interest.

LORD CHANCELLOR [LOUGHBOROUGH]. This case must be added to the others. It is an extremely convenient construction (1): but all convenient constructions are convenient only to the parties who profit by it; not to the children, who are excluded.

[* 733] * As to the point of maintenance, I think, the parent is entitled to an allowance for maintenance here without an inquiry as to his ability; for there is an express direction for maintenance.

For the Children. That was the case in *Andrews v. Partington*, 3 Bro. C. C. 60: but Lord Thurlow refused it; holding, that the will had not directed the maintenance of the children, provided the father was of ability to maintain them; for the allowance of maintenance would in effect be a legacy to the father. The gift will not discharge the father from his natural duty. The interest must therefore accumulate notwithstanding that direction.

LORD CHANCELLOR. *Andrews v. Partington* goes a great way. This provision is manifestly intended for the benefit of the family. The ability of the father must depend upon the number of the children. It cannot be laid down as an absolute rule, that it has the effect of a legacy to the father. This family is increasing; and by refusing maintenance I am accumulating for the children, who take the whole of this property, and diminishing the funds, the father has for maintaining the children, I am obliged to leave unprovided for. I made an order for maintenance in the case of Mr. Mundy's daughter (2) whose father was beyond all doubt of ability. I can only support the decision upon the first point, as to the vesting, upon the cases decided on the principle of convenience; and I should use the children who are excluded, very ill, if I permitted the others to take out of the father's funds, what might go to make up the loss arising from that decision.

Refer it to the Master to consider, what will be a proper allowance for the maintenance of these children; regard being had to the number of children of Dixon Hoste (3)

The Solicitor General [Sir John Mitford], (as *amicus Curiae*) observed, that Lord Thurlow certainly changed his opinion in a case subsequent to *Andrews v. Partington*. The father being present in

him, and the Lord Chancellor in *Prescott v. Long*, *ante*, vol. ii. 690, though they submitted to the rule, disapproved of it; and expressed their opinions, that the same construction ought to have been made as upon a marriage settlement. In *Hill v. Chapman*, *ante*, vol. i. 405, Lord Thurlow says, *Ellison v. Airey* went upon a refinement; but cannot now be shaken. See p. 408, and the note.

(1) *Ante*, vol. ii. 691.

(2) *Mundy v. Earl Howe*, 4 Bro. C. C. 223; *Sisson v. Shaw*, *post*, vol. ix. 285, and the note, 288; *Maberly v. Turton*, xiv. 499; *Jervoise v. Silk*, Coop. 52. See as to maintenance for the time past, *Reeves v. Brymer*, vi. 425 and the note.

(3) June 22d, 1799.—The Master having reported, that the interest of the fund in Court, above 4000*l.* ought to be allowed to the father for the expense he was at in maintenance and execution, a decree was pronounced accordingly, on farther directions.

Court declared, he would not, unless compelled, allow maintenance to a child who had 5000*l.* a-year, to the prejudice of his other children. Lord Thurlow, being struck with that, made the order.

1. THAT, where a bequest is made to all the children of a family, but the vesting in possession is postponed, those children who are born before the period of distribution, will not be excluded; see, *ante*, note 3, to *Hill v. Chapman*, 1 V. 405.

2. In order to justify an allowance for the maintenance of infants, it is not absolutely required, that their parents' inability to maintain them should be first shown. *Cavendish v. Mercer*, 5 Ves. 197.

MIDDLETON v. CLITHEROW.

[* 734]

[1798, MARCH 21.]

BEQUEST "to the Society for increasing Clergymen's livings in England and Wales for the perpetual purpose of increasing their livings:" the Governors of Queen Anne's Bounty alone answer the description; and as all their funds are laid out in land, the bequest is void by the Statute of Mortmain.

JOHN TAYLOR by his will, after giving several annuities and some charitable legacies, and appointing — Middleton residuary legatee, as to the annuitants mentioned in his will, gave and bequeathed all the annuities upon their respective deaths "to the Society for increasing clergymen's livings in England and Wales for the perpetual purpose of increasing their livings."

The bill was filed by the residuary legatee, who was also one of the executors, and by an annuitant and a legatee. By the decree an inquiry was directed, whether there were any and what societies for increasing Clergymen's livings in England and Wales.

The Master by his report stated, that the principal fund for increasing small livings is that usually called Queen Anne's Bounty; which is for the augmentation of the maintenance of poor clergy; the Governors whereof are Defendants; and that there are two other charities for the augmentation of small livings, supported by estates in the counties of Somerset and Devon: the one under the will of Mrs. Pyncombe, to enable poor clergy in general to apply for assistance from Queen Anne's Bounty; the trustees whereof are Defendants; and the other is secured by estates devised by Susannah Strangeways Home for the benefit of poor Vicars in the counties of Cornwall, Devon, Somerset, and Dorset, applying for assistance from the said funds: the trustees whereof are also Defendants; and he did not find, that there were any other charities for increasing Clergymen's livings.

Mr. *Mansfield*, for the Plaintiff, the residuary legatee, said, this bequest was void: there being no society, that answers the description, but the Governors of Queen Anne's Bounty; and it had been

repeatedly determined, that bequests to them are void under the statute of Mortmain ; because all their funds are laid out in the purchase of estates.

LORD CHANCELLOR [LOUGHBOROUGH]. The two other charities cannot possibly meet the description in the will.

Declare the charity void ; and the residuary legatee is to be at liberty to apply, as the annuities fall in.

As to the rules of "the Corporation of Queen Anne's Bounty," and the confirmation thereof by the Crown, to which alone is reserved the power of altering such rules, and making new ones ; see *Widmore v. Woodroffe*, Amb. 734.

[* 735]

HODGES v. PEACOCK.

[ROLLS.—1798, MAY 1.]

LEGACY by will: the same sum given by codicil to the same person upon a contingency was held additional. (a)

Legacy to A. if he be living, and in case of his death before the decease of B. to C. is contingent ; namely, if A. survives B., [p. 735.]

WICKENS HODGES by his will, dated the 21st February, 1794, after several legacies gave and bequeathed to William Hodges, his son by his first wife, the sum of 150*l.* sterling ; and also gave and bequeathed to him the ground-rents of two leasehold houses in Great Cumberland Place ; to hold to him his executors, administrators and assigns.

By a written paper, dated the 1st of May, 1795, signed by the testator, and entitled "Instructions and directions to my friends and executors," the testator after stating, of what his property consisted, proceeds thus :

"By the arrangement now made in my will and codicil I hope the legacies given to my three children Mary Catherine and Wickens Hodges will be as nearly equal as possible especially when Wickens is of the age I mean he should be during his mother's life that is 150*l.* a-year a-piece I mean it should be so and after their mother's death the remaining unappropriated part of what I possess to be equally divided among them fairly share and share alike As to my son William Hodges he has spent first and last about 4500*l.* in what he began business with in what we have given him since in what my sister has given and will give him in what I have given and will give him and his children and what my sister has engaged to pay for him at her death and the continual expenses of Mr. Pratt has been at in supporting his family and what he farther will receive at

(a) Where two legacies are given *simpliciter* to the same legatee by *different instruments*, the latter is cumulative, whether its amount be equal, or unequal to the former. See *ante*, note (a) to *Moggridge v. Thackwell*, 1 V. 464.

Mr. Pratt's death all these things will probably turn out first and last to make his fortune perhaps equal at least to any of my other children I mean not to show any partiality I only mean to make some distinction between the dutiful and undutiful the deserving and undeserving this idea is at least consonant to my idea of the rules of common justice and is the best apology I can make for the seeming apparent difference in the disposal of my property."

By a codicil, dated the 27th of July, 1795, the testator gave legacies to his children by his second wife, to whom he had respectively given legacies by his will; and declared, that he *gave all the said legacies so given to his children by his [* 736] second wife in addition to the legacies given them by his said will. The codicil then proceeds thus:

"I give unto my son William Hodges by my first wife 150*l.* if he be living and in case of his death before the decease of my present wife I give the said William Hodges 150*l.* to be equally divided among his five children or such of them as may be then living share and share alike I revoke the demise of the two ground-rent houses in Great Cumberland Place which I had given to my son William till after my wife's death and when event takes place they are to come into his possession and he is to take and enjoy the rents for his own use and his heirs."

Then after charging one of his executors the testator confirmed his will in all respects, except as it was revoked or altered.

The testator died in 1797, leaving his wife surviving him. The bill was filed by his son by the first wife, claiming both the said legacies of 150*l.* each under the will and codicil.

The paper, dated the 1st of May, 1795, was proved by the executors in the Ecclesiastical Court with the will and codicil.

Mr. *Romilly*, for the Plaintiff. The rule of this Court is perfectly established; that where a legacy is given by will, and a legacy of the same, or less, or of greater, amount is given to the same person by a codicil, the legatee is entitled to both, unless from some circumstances of internal evidence an intention to substitute the one for the other can be inferred. For that purpose slight circumstances have certainly been admitted by the late cases; but *Coote v. Boyd*, 2 Bro. C. C. 521; *Moggridge v. Thackwell*, 3 Bro. C. C. 517; *ante*, Vol. I. 464 (1), and the late case of *Barclay v. Wainwright*, *ante*, 462, in which that inference was made, were cases, in which, the legacies were given by two codicils; and therefore the same presumption in favor of the legatee did not arise, as upon a will and a codicil; for a codicil is always intended as something in addition to a will; but it is extremely probable, that a testator making a second codicil may have forgot, that he had made one before; and that was the opinion of the Court in all those cases. In *Allen v. Callow*, *ante*, 289, your Honor laid great *stress [* 737] upon a circumstance, that occurs in this case; that the

(1) See the note, 466.

other legacies are given expressly in addition : but that alone is not sufficient upon the whole of this will and codicil. Confirming the will, except where it was revoked or altered, he must mean expressly altered. The memorandum shows the intention for an equal distribution ; and accounts for the apparent inequality in the disposition to the Plaintiff. The intention to show no partiality is strong to show, that the Plaintiff's legacy also is to be in addition. If the legacy by the codicil is construed contingent, that also is a strong argument for addition ; for otherwise it would be taking from him every immediate disposition by the will ; which after his declaration is an impossible intention ; and the Court would require strong words for that.

Mr. *Johnson* for the Defendants, the executors. Upon all these instruments an intention to substitute appears ; and it is to be collected, that the son is to take no benefit till after the death of the wife.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Upon what principle am I to hold this a substitution ? It is not the same legacy ; but quite a different thing, a contingent legacy ; for that must be the construction : it cannot mean, if he be living at the testator's death. I am not at liberty to suppose, his intention was the same as in that memorandum ; for, as he made a subsequent codicil, I cannot take into consideration his intention on the 1st of May. *Non constat*, that intention might not have been totally laid aside. How do the Defendants get over this : why did he not revoke the legacy as well as the disposition of the ground-rents, if he meant the same as to the legacy ? I am of opinion, I cannot make it a substitution or a revocation.

Declare the Plaintiff entitled to the one legacy, as a present legacy, to the other, in case he shall be living at the death of the testator's wife ; if not, then among his children ; and he must have the costs.

IN what cases legacies are to be deemed accumulative ; and when one gift must be understood to have been intended as a substitution for another ; see, *ante*, notes 2, and 3, to *Moggridge v. Thackwell*, 1 V. 464.

SHALLCROSS v. FINDEN.

[ROLLS.—1798, MAY 3, 7.]

DEVISE after payment of debts: the debts are charged. (a)

Distinction between debts and legacies in an implied charge upon an estate specifically devised, (a) [p. 739.]

RICHARD WARD being seised of the remainder and inheritance of freehold estates in Leicestershire, expectant upon an estate for life in his father, and subject to a mortgage, by his will made the following disposition :

“After payment of all my just debts funeral expenses and the expenses of the probate hereof as likewise my testamentary articles I give and bequeath unto my trusty and worthy servant Mary Heath the sum of 50*l.* of true and lawful money of Great Britain to be paid unto her as soon as convenient after my decease And as to such expectancys in fee in reversion or any other claim I may hold upon that freehold tenement situated at Husband’s Bosworth com. Leicester now in possession of Samuel Stevens at the time of my decease I give and bequeath the whole of such title and claim unto my dearly beloved father William Ward for his own use and benefit for ever I likewise bequeath unto my said dearly beloved father all my household furniture, linen and wearing apparel, likewise plate, pictures, &c. &c.”

The testator appointed his father executor.

After the deaths of the testator and his father the bill was filed by the simple-contract creditors of the former against the devisees in trust and legatees of William Ward, the father ; the simple-contract debts of Richard Ward exceeding his personal estate to the extent of 670*l.* ; and the question was, whether by his will those debts were charged upon his real estate.

Mr. *Graham* and Mr. *R. Smith* for the Plaintiffs contended, that the words “after payment of all my just debts” afforded an irresistible inference of an intention to dispose of what should remain after payment of his debts. They relied on *Williams v. Chitty*, ante, 545, where the several cases upon this point are cited, and *Kidney v. Coussmaker*, ante, Vol. I. 436 ; Vol. II. 267 (1).

Mr. *Piggott*, for the Defendants. The question is, whether those words over-ride the whole will. In *Lord Godolphin v. Penneck*, *2 Ves. 271 ; and *Leigh v. Lord Warrington*, 4 Bro. [*739] P. C. 90, there were words, that made it natural for the Court to do what they did. The Court is glad to find, that there are any expressions in the will, from which they can make the testator do that, which is morally just : but such expressions must be

(a) A devise “after paying debts,” amounts to a charge for debts on the real estate. See ante, note (a) to *Kidney v. Coussmaker*, 1 V. 436.

(1) This decree has been affirmed upon appeal to the House of Lords. See the note, ante, vol. i. 447.

found. This is only a direction, that before the legatee of 50*l.* can claim that legacy, which must be paid out of the personal estate, the debts shall be paid. The testator gives expressly the whole of his interest in the real estate, which excludes the implication, that arises in the other cases.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Is there a single case, in which the testator has said "after payment of my debts," and the Court has said, it shall not affect all the real estate, whether specifically devised, or not? I do not know such a case. The words "after payment of my debts" mean, that he will not give any thing, until his debts are paid. He could not help paying his debts out of his personal estate. He could not give a pecuniary legacy but after his debts paid. Therefore if I do not make that construction, part of the will is perfectly nugatory. I agree, that if a testator does manifest in any part of his will, that his debts shall be paid, they are to be paid before any disposition of what he has power to dispose of. "After payment of his debts" means, that, until his debts are paid, he gives nothing; that every thing, he has, shall be subject to his debts. To give those words any effect, they must charge the real estate. I am very clearly of opinion, that wherever a testator says, he wills, that his debts shall be paid, that will ride over every disposition, either as against his heir at law or devisee; and the words "after my debts paid" mean the same thing (1).

As to the distinction between debts and legacies, I am still of the same opinion, that I held in *Kightley v. Kightley*, ante, Vol. II. 328; though the Lord Chancellor in *Williams v. Chitty*, ante, 551, doubted my distinction (2). I cannot agree, that, where there is a specific devise, there is no difference between debts and legacies. The testator must be taken to mean his debts to be paid, and then his legacies to be paid; and a specific devise is as much a legacy in this sense as a pecuniary legacy. If a testator directs his legacies to be paid, and then gives a house or a horse, there is no reason why a specific devise should not take effect as much as a pecuniary *legacy. He has as much intention, that a specific legacy shall go to the legatee as a pecuniary one.

Declare, that the debts are charged upon the real estate.

THAT Courts of Equity will be anxious to make a testator's real estate applicable to the discharge of just debts, when such debts must otherwise go unpaid; see, ante, notes 1, and 10, to *Kidney v. Coussmaker*, 1 V. 436, notes 2, 3, and 4, to *Hamilton v. Worley*, 2 V. 62. And as to the distinction, in this respect, between charges of debts and legacies, see note 6, to *Kidney v. Coussmaker*, ubi supra, and note 1, to *Kightley v. Kightley*, 2 V. 328.

(1) See *Powell v. Robins*, post, vol. vii. 209.

(2) *Post*, vol. v. 362, *Keeling v. Brown*, the Master of the Rolls adheres to his opinion.

WHICHCOTE v. LAWRENCE.

[1798, MAY 6, 8.]

THERE is no general rule, that a trustee to sell shall not be himself the purchaser: but he shall not thereby gain profit to himself: one of several trustees to sell having purchased, and afterwards sold at a profit, was therefore decreed to account for that profit with costs. (a)

Laches does not apply to a large body of creditors, [p. 740.]

By indentures, dated the 25th of March, 1790, Wildbore Garnar and John Garnar conveyed divers real estates in Grantham and Swineshead in the county of Lincoln, to Joseph Lawrence, James Garnar, and four other persons, in trust to sell them by public auction or by private contract for the benefit of their creditors. The

(a) In the present case Lord Loughborough "seems to have spoken with a carelessness and latitude of expression, which has given occasion to much criticism in the subsequent cases. It is to be observed, that relief was here granted to a minority of the creditors, and it is not the decree, but the observations of the Chancellor, that are deemed inaccurate." Per Kent, Chancellor, *Davoue v. Fanning*, 2 Johns. Ch. 260, where the authorities and principles are reviewed with masterly ability. It may be laid down as a general principle, that wherever a person is, either actively or constructively, an agent for others, all profits and advantages made by him in the business, beyond his ordinary compensation, are for the benefit of his employers. Story, Agency, § 211; 2 Story, Eq. Jur. § 1261; *Giddings v. Eastman*, 5 Paige, 561; *Campbell v. Penn Life Ins. Co.* 2 Wharton, 64; *Bartholomew v. Leach*, 7 Watts, 472. Therefore, when a trustee of any description, or any person acting as agent for others, sells a trust estate, and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled, as of course, in his election, to acquiesce in the sale, or to have the property re-exposed to sale, under the direction of the Court, and to be put up at the price bid by the trustee; and it makes no difference in the application of the rule, that the sale was at public auction, *bona fide*, and for a fair price. 4 Kent, Comm. 488, (5th ed.), and cases cited. If a trustee misapply the funds of the *cestui que trust* and purchase a judgment or other security therewith, the latter has an election to take such judgment or security or to call upon the trustee to make good the original purchase. *Steele v. Babcock*, 1 Hill, N. Y. R. 527. An agent employed to sell cannot himself become the purchaser; nor when employed to buy can he be the seller. *Lees v. Nuttall*, 1 Russ. & M. 53; S. C. 2 M. & R. 819; *Copeland v. Merc. Ins. Co.* 6 Pick. 196; *Reed v. Warner*, 5 Paige, 650; *Reed v. Norris*, 2 M. & Craig, 374; *Beal v. McKierman*, 6 Mill. Louis, 407; *Matthews v. Dragand*, 3 Dessaus. 26; *Monroe v. Alaire*, 2 Caines, Ca. 192. And an agent, employed to purchase, cannot purchase for himself. *Taylor v. Salmon*, 2 Comp & Mees. 130.

If a trustee, being strictly honest, should buy for himself an estate of his *cestui que trust*, and then should sell it for more, he would be held still to remain a trustee. 1 Story, Eq. Jur. § 321; *Prevost v. Gratz*, 1 Peters, Cir. 367; S. C. 6 Wheat. 481. Nor would it be necessary to show an advantage resulting to him; for, in all cases of purchases by a trustee on his own account of the estate of his *cestui que trust*, even at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not. *Davoue v. Fanning*, 2 Johns. Ch. 252; *Farnam v. Brooks*, 9 Pick. 202; *Docker v. Somes*, 2 Mylne & K. 655; *Baker v. Whiting*, 3 Sumner, 476; *Saagar v. Wilson*, 4 Serg. & Watts, 102. A trustee is bound not to do any thing which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it. *Hamilton v. Wright*, 9 Clarke & Fin. 111, 123. And the rule against purchasing the trust property applies to an agent employed by the trustee for the purposes of the sale, as strongly as to the trustee himself. *Whitcomb v. Minchin*,

estates were accordingly put up to auction at Grantham upon the 27th of May following in eleven lots; at which sale Lawrence, the trustee, who was a banker at Grantham, became the purchaser of Lot 2; and William Laxon bidding for Lawrence bought Lot 10. Lot 3 was not sold at that time: but at a subsequent auction upon the 25th of November, 1790, Lawrence by means of an agent purchased that also. The conveyances of these three lots to Lawrence were perused and approved by James Garnar, the trustee; who was solicitor to the trust; and they were executed several months after the sale by him and the other surviving trustees, two having died previously to the sale. The creditors, who were very numerous, received under the trust 18s. 8d. in the pound. In 1796 Lawrence sold the estates, he had so purchased; after which, upon the 16th of November, 1796, the bill was filed by three of the creditors, praying, that the Defendant Lawrence may be declared to have made the said purchases of the said trust estates and the sales thereof on account of the trust for the benefit of the creditors; and that an ac-

5 Mad. 91. But when it is said a trustee may not purchase the trust property, the meaning must be understood to be that the trustee may not *purchase from himself*; for there seems to be no rule that a trustee may not *purchase from his cestui que trust*. However, a purchase by the trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the Courts will watch with the utmost diligence. The exception runs, it is said, so near the verge of the rule, that it might as well be included under it. Lewin, Trusts, 379, ch. 19, § 2, pl. 1, and the English cases cited.

So the master of a ship, purchasing the ship at a sale by public authority, cannot purchase for himself, unless the owner afterwards elects to allow him the right. *Chamberlain v. Harrod*, 5 Greenl. 429; *Church v. Marine Ins. Co.* 1 Mason, 341; *Barker v. Marine Ins. Co.* 2 Mason, 360; *The Schooner Tilton*, 5 Mason, 462, 480.

But in all these cases, if the principal, after a full knowledge of all the circumstances, deliberately ratifies the act of the agent, or acquiesces in it for a great length of time, it will become obligatory upon him; not by its own intrinsic force, but from the consideration, that he thereby waives the protection, intended by the law for his own interests, and deals with the agent, as a person, *quoad hoc*, discharged of his agency. Story, Agency, § 210; 1 Story, Eq. Jur. § 321; *Hawley v. Cramer*, 4 Cowen, 717; *Van Epps v. Van Epps*, 9 Paige, 237; *Scott v. Davis*, 4 Mylne & C. 87. What shall be deemed a reasonable time, within which the *cestui que trust* must apply to set aside the sale, is not susceptible of any definite rule, but must depend upon the circumstances of the case, and the sound discretion of the Court. Eleven years have been deemed a reasonable time. *Butler v. Haskell*, 4 Dessaus. 702. But an application has been refused after sixteen years. *Bergen v. Bennett*, 1 Caines, Ca. 1. But length of time will in no case furnish a presumption of acquiescence in a purchase, unless it appears that the *cestui que trust* had notice that the trustee had become the purchaser. *Prevost v. Gratz*, 1 Peters, Cir. 370. As additional authorities on the subject of this note, see *Schäffelin v. Stewart*, 1 Johns. Ch. 620; *Quarles v. Lacy*, 4 Munf. 251; *McGuire v. McGowan*, 4 Dessaus. 486; *Perry v. Dixon*, ib. 504; *Anderson v. Fox*, 2 Hen. & M. 245; *Eichelberger v. Barnitz*, 1 Yeates, 307; *Hawley v. Marcus*, 7 Johns. Ch. 174; *Ex parte Wiggins*, 1 Hill, S. C. Eq. 354; *Davis v. Simpson*, 5 Harr. & J. 147; *Boyd v. Hawkins*, 2 Bad. & Dev. Eq. 207; *Lazarus v. Bryson*, 3 Binn. 54; *Campbell v. Penn Life Ins. Co.* 2 Wharton, 53; *Brackenridge v. Holland*, 2 Blackf. 377; *Wade v. Pettibone*, 11 Ohio, 57; *Mills v. Goodsell*, 5 Conn. 475; *Lovell v. Briggs*, 2 N. H. 218; *Currier v. Green*, ibid. 225; Smith, Mercantile Law, 93; and an interesting article on the Purchase of Trust Property by Trustees, 29 London Law Mag. 362-370. No agent will be permitted to take beyond a reasonable compensation for his services, or to hold any profits incidentally obtained in the execution of his duty. See, *ante*, note (a) to *Massey v. Davis*, 2 V. 317.

count may be taken of the money received by the Defendant in respect of the sales of the said estates and the rents and profits, and of the money paid by him for the purchases.

In support of the charges of the bill Beaumont Leeson deposed, that the Defendant Lawrence said, he would not take 500*l.*; nor did he know, that, if he was offered 1000*l.*, he would take it: he had had the tenant with him that morning; and he had offered him a rent, which was either 130*l.* a year, or 30*l.* a year advanced rent, * which, the deponent did not recollect. The de- [*741] ponent saying, they had spoilt the sale of Lot 3 by selling the stable which belonged to it, with Lot 2, the Defendant said, it was Mr. Raby's (1) plan; and he had nothing to do with it. The deponent saying, Lot 3 was thereby reduced to very little value to any person except the Defendant, and that therefore he might buy it at his own price, the Defendant replied "Let me alone;" or to that effect. The deponent said, if the stable had not been taken away from Lot 3, he should have been induced to bid for it.

James Garnar deposed, that upon the evening of the sale in consequence of Lot 3 not being sold the deponent received instructions from the other trustees to advertise the same for sale by private contract, and to ask 500 guineas, and not to take less than 500*l.* and believes, the Defendant Lawrence was present. Some time afterwards the Defendant called upon the Deponent; and offered 450*l.* for that lot. The deponent expressed his surprise at the offer; as the Defendant knew his instructions; and it was worth more to him than to any one else; as it lay intermixed with Lot 2, which he had bought: but the Defendant refused to give that price. The deponent refused the price offered, as inadequate; not because he was unwilling to sell to the Defendant by private contract. The deponent being obliged to be absent upon the day of the second auction for the sale of Lot 3, he applied to the Defendant; desiring, he would not suffer it to be sold at an under-value; and upon his return the Deponent called upon the Defendant; and expressed great dissatisfaction; saying, his character would be reflected on: that he had acted in a double capacity; that as trustee he ought to sell for the most, that could be got; and as purchaser he endeavored to depreciate the value of the premises to get them upon his own terms: the Defendant ordered his clerk to withdraw; and said, "say no more about it: I do not value 40*l.*"

The Defendant Lawrence by his answer stated, that upon the evening preceding the sale in May at a meeting of the trustees, attended also by Mr. Hutton, a barrister, on behalf of Mrs. Raby, a principal creditor, the Defendant publicly consulted the trustees whether he as being a trustee for the sale of the estate was

* at liberty to bid: and Handley, one of the trustees, who [*742] was an attorney, declared his opinion, that as the estates were intended to be sold by auction, they were open to any person

(1) One of the deceased trustees.

that chose to purchase ; and the Defendant was as much at liberty to bid as any other person ; and Hutton also declared his concurrence in that opinion : and it appeared to meet the general approbation. In consequence of that the Defendant attended at the sale ; and bid for Lot 2, consisting of a messuage in Grantham ; and being the highest bidder, that lot was knocked down to him at the sum of 505*l*. After that it was intimated to him, by Handley, that one of the company, John Manners, Esq. since deceased, objected to his bidding : in consequence of which he immediately declined bidding in his own person, lest he should thereby prejudice the sale ; and he desired William Laxon to bid on his behalf. Laxon accordingly bid for Lot 10, consisting of an estate at Swineshead, that let at 112*l*. a year ; which was knocked down to him at the sum of 3620*l*. and the Defendant being the banker to the trust gave credit for the deposits upon those purchases. It was agreed at the said meeting of the trustees, that the sale should be conducted with perfect fairness ; and that no person should be employed to enhance the price ; and that to prevent the estate from being sold at a loss the lots should be put up at certain prices then agreed upon ; which were somewhat lower than the same had been valued on behalf of the trustees ; and it was agreed and declared previously to the auction, and made one of the conditions, that the highest bidder, if more than one, above the sum, at which each lot should be put up, should be the purchaser. The said lots were bought agreeably to the said resolutions. Though it might not be known at the sale, it was known immediately afterwards, that Laxon bid for Lot 10 on behalf of the Defendant. No objection was ever made by James Garnar or any other person. The conveyance of Lot 10 was dated the 11th and 12th of October, 1790 ; and the Defendant continued in possession of the premises comprised in that lot till the 25th of March, 1796. The house comprised in Lot 3 was not sold ; because, as the Defendant believes, no bidder offered. That lot was put up afterwards to be peremptorily sold upon the 25th of November, 1790. Thomas Rawlinson bid for the Defendant 410*l*. ; and he being the highest bidder, it was knocked down to him ; and that lot and Lot 2 were conveyed to the Defendant by the trustees by indentures, dated the 7th and 8th of October, 1791. On account of the house [* 743] and * premises comprised in Lot 3, lying contiguous to and intermixed with other premises belonging to the Defendant he considered them as of greater value to him than to any other person ; and after the first auction he offered James Garnar 450*l*. for them : but Garnar judged it right to put them up a second time to auction. The Defendant in consequence of a considerable loss in the banking business found it prudent to dispose of certain parts of his real property : and he disposed of nearly the whole of the said premises with other parts of his estates. In November 1795, the premises comprised in Lot 10, then let at 130*l*. a-year, the highest rent, the Defendant ever received for them, were, together with another estate at Swineshead, let at 45*l*. a-year, sold by him.

in small lots, exclusively of the timber thereon, for 6918*l*; and he has also since sold Lot 2, for 735*l*., including the fixtures, which the Defendant paid for upon his purchase over and above the purchase-money; and Lot 3, with another house of his adjoining he sold for 790*l*. The Defendant sold the premises to advantage on account of the great increase of the value of land from the high price of corn and stock and the general demand for estates in that neighborhood, and in consideration of dividing them into small lots. James Garnar had the principal management of the trust. Lot 10 was valued on behalf of the trustees at 4000*l*. The trustees fixed, that it should be set up at 3500*l*. The only conversation, the Defendant had with the tenant of the premises comprised in Lot 10, was by asking him, what rent he could afford to give: he answered 130*l*. a-year. He afterwards became tenant to the Defendant at that rent. The Defendant employed Laxon, as being his general agent and receiver of his rents; and for no other reason; and denies, that he employed him with a view of deterring persons from bidding; and does not believe any person was prevented from bidding, upon the presumption, that Laxon was bidding for Lord Brownlow; whose agent he was. There was to the best of the Defendant's recollection only one bidder for Lot 10 besides Laxon. The Defendant denies, to the best of his recollection and belief, that he ever declared, he would have given 5000*l*. for Lot 10, rather than have lost the same; and saith, he would not have given 5000*l*.; and doth not believe, that at the time of the said purchase he would have given more than 4000*l*. or 4500*l*. He purchased said premises on account of their lying intermixed with different parts of his estate; not upon speculation to sell again. He sold Lot 10 for 5319*l*. as he computes the sum; and the * plantation in the bill men- [* 744] tioned was included in the sale, with the exception of the timber; which was reserved to him; and which with other wood upon the said estate he has since sold for 84*l*. He denies, that at the time of the said purchases he believed, he made them at prices inferior to the value; or that he intended to depreciate the value. He admits, he offered James Garnar 450*l*. for Lot 3; but denies, that Garnar had instructions from the trustees not to let it go under 500*l*.; and he refused the 450*l*. not thinking the price inadequate, but because he thought it not right, that the premises should be sold to the Defendant by private contract. The Defendant denies that James Garnar requested him not to suffer the said premises to be sold at an undervalue: on the contrary, it was the resolution of the trustees, that no person should be employed to bid on their behalf. He denies, that James Garnar expressed a dissatisfaction to him, as stated in the bill, upon finding, he had paid but 410*l*.; but admits, Garnar made some remark to him upon the difference between that price and the price he had offered; upon which he admitted, they were of more value to him than to any other person on account of their lying intermixed with his property; and therefore he declared,

that as the sum of 40*l.* was no object to him, he was ready to give the trustees credit for that sum, in case it should be wanted to make up a dividend to the creditors. He denies that conversation, as stated by the bill ; and that he sent his clerk out of the room with any design ; and says, if he was sent out, it was only according to the Defendant's usual course, when talking upon business. He sold Lot 3 with a house adjoining for 790*l.* : but the said house cost him 190*l.* subject to a right of dower ; and he had expended 60*l.* in repairs. He stated, that the suit was commenced at the instigation of James Garnar, occasioned by the Defendant's having resold the estates to advantage.

The Defendant went into evidence. The auctioneer deposed, that no puffers were to be employed ; and that 410*l.* was the value of Lot 3 at that time.

Handley, the trustee, deposed, that the Defendant Lawrence was not the managing trustee, but James Garnar. The Swineshead estate was valued for the trustees at 146*l.* a-year. The Defendant Lawrence and James Garnar being resident at Grantham, it was therefore not thought necessary to value the other estates. [* 745] The * prices were fixed by the trustees. There were no fictitious bidders. The Defendant was not known to be the purchaser at the time of the sale ; but declared himself so immediately after.

This witness and James Garnar confirmed the answer as to the Defendant's putting the question, whether there was any impropriety in his bidding.

Brewster deposed, that the re-sale by the Defendant in November 1795, turned out to advantage on account of the premises being sold in small lots. The Swineshead estate was not purchased by him at an under-value.

The auctioneer upon the first sale deposed, that he observed to the trustees of the sale, that they had fixed too high a price upon Lots 2 and 3, so as not to give room for bidders : but Handley replied, they would fetch a great deal of money, and be sold. No puffers were employed.

There was farther evidence, that the price given by the Defendant was fair ; that he was known to be the purchaser very soon after the sale ; and that selling in small lots and the increased price of grain occasioned the difference of price upon the re-sale.

Mr. *Mansfield* and Mr. *Sutton*, for the Plaintiffs—and Mr. *Trower* for the Defendants Wildbore Garnar and John Garnar. In *Croux v. Ballard*, 3 Bro. C. C. 120, Lord Thurlow lays it down, that a trustee to sell cannot purchase for himself, even if he buys fairly, and with the knowledge of the party selling ; but in this case there is the strongest evidence of fraud. The Defendant acted for his own advantage upon intelligence, he got privately from the tenant, as to the highest rent, he could pay ; and he did not communicate that intelligence at the auction. Being prevented from bidding openly, he employs a person, who was not known, to bid for him :

but being the known agent of Lord Brownlow was supposed to bid for Lord Brownlow ; and thereby he prevented a competition.

A trustee becoming a purchaser is answerable for any profit, he may derive from the transaction. The inconvenience of the rule is on purpose to guard against the commission of the fraud.

* *Attorney General* [Sir John Scott], Mr. Grant, and Mr. [*746] *Whishaw* (a), for the Defendant. The Defendant, a trustee, having taken upon himself to purchase the estate, the creditors had in 1790 an option to consider him as a trustee, and an Equity to call for an account of his conduct : but they ought to have determined that option then ; and not to let him call in his money, and continue owner of the estate for six years. Is it fit under all the circumstances, and considering the large dividend, that has been paid, that the Court should now grant what is prayed ? There is no such rule in the extent, in which it is said to be laid down in *Crowe v. Ballard*, that the party, for whose benefit the rule was established, is not competent to place the trustee in a situation to purchase the estate. That certainly was not the doctrine of Lord Thurlow. In *Fox v. Mackreth*, 2 Bro. C. C. 400 (1), he lays down a doctrine quite different ; though leaning against the Defendant. In the whole argument of that case it was distinctly avowed and proceeded on, that the *cestuy que trust* may sell to the trustee ; and your Lordship in your argument upon that case in the House of Lords said, there was no such general rule, that a trustee cannot purchase from his *cestuy que trust* ; but undoubtedly a trustee, who puts himself in that situation must expect his conduct to be strictly scrutinized and examined in this Court. The true doctrine is, that by accepting the office of trustee he accepts the obligations incumbent on that character ; and one of those obligations is, that he is to make the most of the estate for the trust : but it is competent to him and his *cestuy que trust* by contract clearly made out to dissolve that connection. He must make out, that he is placed in the new situation with the knowledge of the *cestuy que trust*. When you establish the fact of their relation, you throw it upon the trustee to show either acquiescence, or that the circumstances are such as to exclude all the fraud, which it is intended to guard against. All cases of this kind are determined upon their own circumstances. If there was any such general rule, all the discussion upon the particular circumstances would be unnecessary. In almost every case of this sort they begin to show, that the premises were sold at an under-value ; and then go on to account for it by the management of the trustee. In the great case of *The York Buildings Company v. McKenzie*, in the House of Lords, both those circumstances were supported *by a quantity of evidence. There was a great [*747] deal of management to throw the estate into the hands of

(a) Mr. Whishaw became the bosom friend and executor of Sir Samuel Romilly. He died as late as 1843.

(1) As to this case, see, *post*, vol. vi. 627, *Ex parte Lacey*.

M'Kenzie, the common agent, when others would have given a higher price. It was decided upon the principle, that a trustee must not use the superior knowledge, he has, for his own benefit.

In *Whelpdale v. Cookson*, 1 Ves. 9 (1), Lord Hardwicke held, that a trustee for creditors should not purchase even by auction; but said, if the majority of the creditors agreed to allow it, he should not be afraid to make the precedent. There is a very important distinction between purchasers by private contract, the usual case, in which a purchase by a trustee has been set aside, and sales by public auction. The principle is totally different. In the former the price depends entirely upon bargain: a conflict between the wants of the parties on the one hand and their prudence on the other. Therefore the trustee lies under suspicion; because he acts in two characters, whose interests are opposed to each other. But at an auction the price does not depend upon bargain, but is the result of the principle of competition. Therefore after the terms of that competition are settled, if the sale is fair, the seller has nothing to do: he is passive; and therefore the trustee, after those terms are settled, stands in the place of an indifferent person. Here the Defendant is not the sole trustee; in which respect this case differs from all that have been cited. The conduct of these trustees is perfectly correct. They take every precaution; and under these circumstances the Defendant need not even have communicated his intention: but he consulted his co-trustees at a general meeting of them and the creditors with regard to the propriety of his becoming a bidder. His conduct after as well as previous to the sale was perfectly open, and is not marked by any of that secrecy, which is the usual attendant upon fraud. Other very intelligible motives besides that imputed by the evidence of James Garnar may be assigned for the Defendant's offer to accommodate the dispute. He found himself attacked by a person of legal knowledge. He might have some doubt upon that ground. The common motives to prevent litigation, the apprehension of a Chancery suit, might induce him to make that offer, without any consciousness of fraud. James Garnar, the solicitor to the trust, settles the draft of the conveyance to the Defendant; and after an interval of several months, there being full time for consideration, joins in the conveyance with the other trustees. Either he was satisfied with the Defendant's conduct, or he was guilty of a gross and wilful breach of trust. Supposing, the Defendant would have given 500*l.* more, that proves that to be the value, [*748] he would have *given for it by private contract: but there is not an attempt to show, he purchased at an under-value; and on the other side there is clear evidence, that he gave the utmost value. He desisted from bidding openly in his own name, not from any wish to conceal his bidding, for he had given notice of his intention to bid, but upon an objection taken by a by-stander upon a

(1) See, *post*, vol. v. 682, *Campbell v. Walker*, the ground of that case stated from the Register's Book: but Lord Eldon expressed his dissent from it, vi. 628, *Ex parte Lacey*.

different ground, namely, that a trustee bidding would appear as a puffer; and that would damp the sale.

If this transaction was originally voidable, the Plaintiffs have by their conduct and acquiescence given validity to it. The transaction was public and notorious. The circumstances, under which the Defendant purchased, and the price, he gave, were all known to the persons interested in setting it aside. An acquiescence for only three years raised great doubt and difficulty in the mind of Lord Thurlow; though he was overborne by the very strong and peculiar circumstances of fraud in *Fox v. Mackreth*: but his language upon that is very strong and pointed. The circumstance of the Defendants having sold the premises to advantage cannot affect the Judgment of the Court: which will not endure, that parties shall speculate in that manner, and calculate upon events; holding themselves in readiness to act, or not, just as it may suit their convenience. The emphatical observation of Lord Camden in *Smith v. Clay*, 3 Bro. C. C. 629, *n.* so often quoted, are peculiarly applicable.

Reply. It is a clear principle, that a trustee cannot be the seller and the buyer. I never knew a case, in which this Court has refused its aid against a trustee, who has sold to himself. The distinction between the case of a trustee acting alone, and this case, where he was acting with others, is no where to be found. In *Hall v. Noyes* about two years ago, though there were strong circumstances of fraud upon the trustee by the person, whose representatives filed the bill, in their prior dealings, your Lordship held, that the sale could not stand. After several transactions (1) between Hall and Noyes respecting certain leasehold premises Hall conveyed the premises to Noyes and two other persons upon trust to sell. They sold by auction: but the purchaser would not take his purchase, upon some dispute about the amount of the rent, to which it was subject. It was put up again; and nobody bidding, *Noyes [*749] in December 1781 with the assent of the other trustees gave 100*l.* for it; which was proved by many witnesses to be more than any one would give. Hall did not stir for eight years. In the mean time Noyes had surrendered the lease for the purpose of taking a new one. Hall had very fraudulently represented the making bricks as an inducement to Noyes to purchase: but there was a clause in the lease, that prevented him from taking any bricks from the premises. He therefore surrendered the lease, took a new lease, and entered into a partnership; which went on three years. Hall having suffered it all to go on at last filed a bill; which was dismissed. Afterwards, when in gaol, he assigned his interest. The assignee filed a bill; and that also was dismissed. Then Hall's widow, who was his executrix, filed a bill at the distance of ten years, and your Lordship was of opinion, that you were bound to undo that sale to Noyes, and to hold him still a trustee for the Plaintiff, Mrs.

(1) See 3 Bro. C. C. 483.

Hall; though that was not a sale by one trustee to himself: but it was by three trustees to one; not only with the perfect approbation of them all, but with evidence uncontradicted, that the sum given was more than could have been got from any one else. That case therefore is an answer to the distinction attempted between one trustee and more. The mischief is just as great. It is very difficult to find any measure of justice, if the general rule, that a trustee to sell cannot be a purchaser, the rule never yet departed from, is not adhered to. The circumstances make this a most proper case for the application of the rule. Two of these lots were put up at sums much less than the Defendant acknowledges he would have given for them: another by his contrivance is of no value to any one but himself; and he has made a great profit; the reasons of which, as assigned by him, are very dissatisfactory.

As to the acquiescence, nothing less will do, than that the persons injured by the breach of trust completely knew it; and knowing it, did such acts as show, they knew it, and meant to confirm it. The creditors, who executed this deed, are above two hundred.

LORD CHANCELLOR [LOUGHBOROUGH.] The circumstances of this case are such, as do not necessarily require a reference to any general rule in order to decide it: at the same time they are such as to demonstrate the propriety of that rule, when properly understood, upon which the Court has always acted in similar instances; [*750] for *it is obvious, that this estate has not been sold to that advantage, which the knowledge and abilities of Mr. Lawrence, the trustee, exerted towards this estate, when his own, obtained for himself; and if that knowledge and ability had been applied at the original sale, when the estate was sold for the benefit of the creditors, it is obvious, it would have been more beneficial to the creditors than the result of that sale, which with the concurrence of the trustees the Defendant permitted: and at which he became the purchaser. I do not recollect any case, in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser. It would be difficult for such a case to occur; for, unless advantage is made, the act of purchasing will never be questioned. The rule is laid down not very correctly in most of the cases, where you find it. It is stated as a proposition, that a trustee cannot buy of the *cestuy que trust*. Certainly that naked proposition is not correctly true: but an emanation from that, which prevails in all cases, in all laws and countries, where trusts are admitted, led to great discussion in *M'Enzie's Case*, to prove, that the sale, where the trustee to sell is the purchaser, is *ipso jure* null; that there is no sale, no contracting party. That is not the real sense of the proposition: but it is this; which is very plain in point of Equity, and a principle of clear reasoning; that he, who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by

being himself the person to buy (1). He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit. The consequence is beyond doubt, that, in whatever shape that profit redounds to him, whether by management, which is the common case, or by superior good fortune, it is not fit, that benefit shall remain to him. It ought to be communicated to those, whose interests being put under his care afforded him the means of gaining that advantage.

As to the circumstances, this case is not that of a single trustee. Several other persons were concerned in the execution of the trust. Lawrence, being a banker, entered into the trust probably from the advantage, he might derive that the money would probably lie long with him; and it might draw custom to his shop. From his situation he was not likely to be acquainted with the *real [* 751] value. There was more opportunity for that species of management; which does not betray itself much in the conduct and language of the party, where several trustees are acting together. I am sorry to say, there is greater negligence, where there is a number of trustees. But it is the duty of a trustee to correct the negligence, which the number of trustees may occasion. With regard to the house, that constituted Lot 3, it is no answer from Lawrence to say, it was Raby, who directed, that the stable belonging to that house should be added to Lot 2. If he did, it was Lawrence's duty to control Raby. From his conversation it appears, he was perfectly sensible of the advantage of it. It is more remarkable as to Lot 3, Lawrence had gained a considerable advantage over other bidders, having it in his power by the arrangement of Lots 2 and 3 to make both better. Lawrence had applied to get Lot 3 for 450*l*. Why was it put up so low? Lord Hardwicke's observation is very just; that a great deal is in the power of a trustee. He has power to prevent mismanagement. Nothing can be more improper than for him to let a fancy prevail at the auction of lowering the price, at which the estate was put up, because there would be more room for sporting the biddings. He knew, there was a person, who would give 450*l*, without the expense of a public sale; for that person was himself. He had the advantage of getting it for 410*l*. by its being put up so low; and when reproached by Garnar, he admitted, he ought to make it up the sum, he originally offered. Garnar ought at least to have made him pay the difference, when he executed the conveyance. As to the great lot, having a farm in the neighborhood he must have been well acquainted with the circumstances. According to the evidence the value is derived from two circumstances. They suppose, I do not know upon what grounds, that in 1790 it would not have fetched more than the price, he bid, as an entire farm: but it might by an arrangement, extremely material for the consideration of the trustee, and which in his own case he would not have failed to attend to, by dividing it into different lots. That was an advan-

(1) See the rule more precisely defined, *post*, vol. vi. 626, *Ex parte Lacey*.

tage inherent in the estate, if the sale was properly conducted; and he availed himself of it, when he had an eye to the purchase. I have therefore before me absolute demonstration, that if he had acted with regard to the trust with the same degree of vigilance and attention, that he applied to his own affairs, when he came to act for his own benefit with some part of the trust estate, I do not know [* 752] how *much, but more, somewhat considerable more, would have been got, than was obtained upon the former sale. Lord Hardwicke very justly observes, that where a trustee has a prospect of advantage to himself, it is a great temptation to him to be negligent; acting in a manner, that does not quite fix an imputation upon him. His conduct may be so covered, that it may be difficult to fix direct fraud upon him. But the doctrine of the Court would be completely overturned by permitting a trustee to gain profit to himself by the execution of his trust. That is undoubtedly established against Mr. Lawrence; and, there being no measure, by which I can tell, what has been the loss to the trust, I must make him account for all, he has made by the transaction; and the costs follow the decree.

As to the acquiescence, it is put rightly in the argument. You cannot argue upon the acquiescence, where there is a large body of creditors (1). Wildbore Garnar was too much in the power of the creditors; and his act is so immaterial, that it weighs nothing (2).

1. ALTHOUGH the circumstances may not afford palpable evidence of fraud, yet, whenever a trustee purchases the estate of his *cestui que trust*, such a transaction is so open to abuse, that it cannot, (except in very special cases,) be supported in Equity. *Morse v. Royal*, 12 Ves. 372; *Downes v. Grazebrook*, 3 Meriv. 208. And the application of this principle will not depend upon any nice inquiry, whether the sale was, or was not fairly conducted: *Randall v. Errington*, 10 Ves. 428; *Ex parte Bennett*, 10 Ves. 385: for, if such an investigation were necessary before a bargain, obtained by persons standing in situations of influence and trust, could be set aside, the ingenuity of fraud might, in many cases, elude detection; but the broad rule is, that no man shall sell to himself. *Parkes v. White*, 11 Ves. 226; *Hatch v. Hatch*, 9 Ves. 297; *Lister v. Lister*, 6 Ves. 632; *Campbell v. Walker*, 5 Ves. 681. The parties may, indeed, come to an agreement, that with reference to a proposed contract of purchase, they shall no longer stand in the relative situation of trustee and *cestui que trust*; and, if the trustee prove, that, through the medium of such an agreement, he had, previously to the purchase, distinctly and honestly, removed himself from the character of trustee; his purchase may be sustained: *Downes v. Grazebrook*, *ubi supra*, *Sanderson v. Walker*, 13 Ves. 601; *Woodhouse v. Meredith*, 1 Jac. & Walk. 222: the fact, however

(1) *Williams v. Cousmaker*, *post*, vol. xii. 136.

(2) *Post*, *Campbell v. Walker*, *Ex parte Reynolds*, vol. v. 678, 707; vi. 277, 278; *Coles v. Trecothick*, ix. 234, and the note, 240; *Ex parte James*, viii. 337, a purchase by the solicitor to a commission of bankruptcy; *Ex parte Bennett*, a purchase by the solicitor, and a commissioner in bankruptcy; *Randall v. Errington*, x. 381; *Parkes v. White*, xi. 209; *Ex parte Morgan*, *Morse v. Royal*, xii. 6, 355; *Sanderson v. Walker*, xiii. 601; *Attorney General v. Lord Dudley*, *Gregory v. Gregory*, Coop. 146, 201; *Downes v. Grazebrook*, 3 Mer. 200; *Whallon v. Toone*, *Whitcombe v. Minchin*, 5 Madd. 54, 91; *Ex parte Bage*, 4 Madd. 459, a purchase by an assignee in bankruptcy; *Naylor v. Winch*, 1 Sim. & Stu. 555; *Oliver v. Court*, 8 Pri. 127, the case of an auctioneer. As to a purchase by an agent of his principal's property, *post*, *Lord Hardwicke v. Vernon*, vol. iv. 411; *Wren v. Kirton*, viii. 502; *Woodhouse v. Meredith*, 1 Jac. & Walk. 204.

whether he did effectually, and in due time, shake off the character of trustee, will be examined with jealous strictness: *Ex parte Bennett, ubi supra*: and although the connection shall appear to have been really dissolved, yet if information, acquired whilst that connection lasted, has been withheld from the former *cestui que trust*, this concealment will vitiate the contract for purchase. *Ex parte Lacey*, 6 Ves. 626; *Coles v. Trecothick*, 9 Ves. 248; *Oliver v. Court*, 8 Price, 161, 164. Long acquiescence may in this case, as in every other, bar the remedy of the defrauded party; for, the *laches* may, in itself, be unjust, and contrary to equity and good conscience: *Chalmer v. Bradley*, 1 Jac. & Walk. 62; *Webb v. Rorke*, 2 Sch. & Lef. 672: or the property may have passed through the hands of subsequent innocent purchasers: *Bonney v. Ridgard*, 1 Cox, 149: though, of course, if notice of the trust be charged, and proved, the fact that there have been *mesne* assignments will not affect the equity to set aside the transaction. *Attorney General v. Lord Dudley*, Cooper, 146. Generally speaking, however, the *laches* which would bar a legal title, will bar equitable claim; even in cases tainted by fraud: *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Cholmondeley v. Clinton* 2 Jac. & Walk. 139; *Stackhouse v. Barnston*, 10 Ves. 467: but, in a case between a trustee and his *cestui que trust*, the question of *acquiescence* can never arise, till it is first shown that the *cestui que trust* was acquainted with the facts, constituting a fraud upon his rights; so long as he continued ignorant of those facts, there could be no wilful *laches* in not quarrelling with the transaction upon those special grounds. *Randal v. Errington*, 10 Ves. 427.

2. The *dictum* in the principal case, that where there is a large body of creditors, the argument which, in the case of an individual, might arise from acquiescence, cannot apply; must at least, be qualified by the doctrine laid down by Lord Alvanley [ARDEN], that creditors cannot be permitted to come for relief at any distance of time; but must abide by the conduct of the party who manages the cause in the result of which they are concerned. *Hercy v. Dimwoody*, 4 Br. 269.

WILLIAMS v. LORD LONSDALE.

[1798, FEB. 22, 23; MAY 8, 11.]

DEVISE of a copyhold (duly surrendered) to A., and his heirs in trust for B., and his heirs: upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him; and his bill was dismissed without costs.

Whether *Mandamus* to the lord to admit to a copyhold lies. *Qu.*, [p. 754.]

ISAAC HONNOR, being seised in fee according to the custom of the manor of Laleham Billets of 30 acres of customary lands, by his will (having first duly surrendered the premises to the use thereof) devised all the said 30 acres of customary land to his wife Mary in fee: and soon afterwards died; upon which his widow was in 1752 at a Court-baron of the said manor admitted tenant to the said 30 acres; and at the same Court she surrendered them to the use of her will. She afterwards married Sampson Bennet; who died in her life intestate and without issue.

Mary Bennet by her will devised to Jane Noble and Walter Williams all and every her freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, to hold to them, their heirs, executors, and administrators, respectively, according to the nature of the several estates, during the natural life of Catherine Browne

(sister of the testatrix) upon the trusts nevertheless and to and for the several intents and purposes after limited, expressed, and declared : that is to say, upon trust out of the rents, issues [* 753] *and profits, to pay an annuity of 50*l.* into the proper hands of her said ~~sister~~ Catherine Browne during her natural life ; and as to the residue of the rents, &c., after discharging the expense of repairs, and satisfying the said trustees for their trouble in receiving the same, to pay or otherwise permit said Jane Noble to receive the same for and during the term of her natural life for her separate use ; and after the decease of her sister and Jane Noble she devised all the said freehold, copyhold, and leasehold, messuages, lands, &c., to the said Walter Williams, his heirs, executors, and administrators, respectively, according to the nature of the several estates, upon trust for the heirs and assigns of the said Jane Noble for ever ; charged with an annuity of 10*l.* for three years ; and she appointed Jane Noble and Walter Williams executors.

In 1779 the testatrix died. The executors proved the will ; and Walter Williams entered upon the real estates, and received the rents and profits, and applied them according to the directions of the will till 1781 ; when Jane Noble having married Henry Malpass, Williams permitted them to receive the rents, and apply them according to the will.

Jane Malpass died in 1782 without issue or any heir whatever. Walter Williams died in May 1783 ; having never been admitted to the said copyhold estate. Catherine Browne died in June 1783 without any heir ; having been paid her annuity to the time of her death.

The bill was filed by the only son and heir at law of the trustee Walter Williams against the lord of the manor of Laleham Billets ; praying that the Defendant may be compelled to admit him to the said copyhold estate.

The lord claimed by escheat ; the trusts of the will being performed and at an end.

Attorney General [Sir John Scott], Mr. Mansfield, and Mr. King, for the Plaintiff. The defect of a tenant is the only ground, upon which the lord can claim. Here is no defect of a legal tenant. It has been long established, that this is the proper Court to compel the lord to admit.

[* 754] *Lord CHANCELLOR [LOUGHBOROUGH]. This is the case of *Burgess v. Wheate* exactly.

Solicitor General [Sir John Mitford], and Mr. Graham, for the Defendant. The Plaintiff comes into Equity, insisting upon a legal right, and having no equitable right whatever. He is intended to be a mere trustee, to take no beneficial interest. If Mrs. Noble had died in the life of the testatrix, he would have had no claim but for the heirs of the testatrix ; who would have been entitled by descent, not under the will. The Plaintiff comes in quite a different character and for a different purpose from those of the Plaintiff in *Burgess*

v. *Wheate*, 1 Black. 123. There the grantee of the Crown was obliged to come into Equity upon an equitable title against the person having the legal estate, for the purpose of compelling a conveyance; and the decision was upon the ground, that there was no Equity on behalf of the Crown to compel the heir of the trustee to make that conveyance; for the Crown could only claim the Equity vested in the person, to whom the estate was given; and that Equity ceased in consequence of the death of that person without an heir: and therefore it was impossible to sustain that claim. This case is directly the reverse of that. The only title of the Plaintiff is as trustee for a non-entity. There is no ground for Equity to interfere. Equity never interferes upon a copyhold estate but to compel the lord to do justice, where the conscience of the lord is bound in favor of a person claiming properly under the lord. In *The King v. The Lord of the Manor of Hendon*, 2 Term. Rep. B. R. 484, the Court of King's Bench did certainly grant a *Mandamus* to the lord to admit; and they held the same doctrine in *The King v. Rennet*, 2 Term. Rep. B. R. 198; but it was not submitted to.

LORD CHANCELLOR. That case has not been followed, I think (1).

For the Defendant. *The King v. Midhurst*, 1 Wils. 283, which is relied upon in 2 Term Rep. B. R. 198, proves, it ought not to be granted: and it was refused in another case; the Court doubting, whether, as it involved a private right, they could grant a *mandamus*. The question here is simply, whether the Plaintiff has a title in conscience again the lord. In *Burgess v. Wheate*, Lord *Mansfield was in favor of the equity for the Crown: [*755] Lord Henley was of a different opinion; principally upon the ground, that the title of the Crown must be in right of a person not existing; namely, the heir of a person who died without an heir. So this Plaintiff can only claim in behalf of a person who does not exist. A copyholder's is really an equitable title. It is to be completed by admission; which can only be compelled in a Court of Equity; and until actual admission the Courts of Law will not take notice of it. This is not the case of the heir, but of a person claiming a right to be admitted upon a surrender to the use of a will.

LORD CHANCELLOR. I had taken this up a little too quickly. I conceived it to be the case of *Burgess v. Wheate*. So it very nearly is: but upon looking into that case it rather applies for the Defendant; for the ground of the decision, particularly in Lord Northington's opinion, is, that the Court had no jurisdiction. Then *ex converso* I want to know, what jurisdiction I have. They might have demurred to the bill.

For the Plaintiff. The right of a copyholder is not an equitable, but a legal, right: for the admission is mere form: but though it is a legal right, yet the Courts of Law have now said, there is no rem-

(1) Since this case the Court of King's Bench has maintained that jurisdiction: *The King v. Coggan*, 6 East, 431, and *The King v. The Duke of Leeds*, in the note, 432.

edy at law; for the late cases of the *Mandamus* which were founded upon a mistake of a case in Comberbach, cannot be supported; and the Courts have said, that, though it is a legal right, the copyholder may come into Equity. If a fine was due, the lord might call upon him to be admitted. To complete his right against the lord and to preserve evidence of his title it is necessary for him to procure an admission. For those reasons he must come here, though having a legal title; the Courts of Law refusing their assistance. It is a single case. To say, this Plaintiff has no right to procure admittance from the lord, is to say, no copyholder has such right. He is in the same situation as the heir of any other copyholder, if *Burgess v. Wheate* is law; for the trust is nothing to the purpose. The Defendant is only to look, who was the last legal tenant; and whether he disposed of his estate or suffered it to descend to his heir. It is immaterial to the lord, what uses are behind. It is true, he comes upon a legal title: but there is a form necessary to complete and give evidence of his title; which can be obtained here only.

[* 756] In Comyn's *Digest and Equity Cases Abridged, tit. Copyholder, there are many cases establishing the jurisdiction of this Court to compel the lord to admit. The Defendant received the surrender from the owner; and must therefore admit the person directed by it.

LORD CHANCELLOR [LOUGHBOROUGH]. The lord could not help receiving the surrender.

The only point determined in *Burgess v. Wheate* was, that the Crown, entitled as it was supposed, by escheat upon the death of the *cestuy que trust*, had not a title by *subpoena* in this Court to make the heir of the trustee, having merely a legal estate, convey; but there was no equity for this Court to exercise jurisdiction. Is not the converse of that equally true? If the lord has no equity in that case, can I find any ground of equity, where the person having the legal estate, and telling me, he has no beneficial interest, desires me to act for his benefit upon the estate of the lord? The Court considers the mere legal estate as nothing. It is clearly true, that if the lord refuses to admit the tenant, this Court will compel the lord to admit him: the title standing upon the rolls of the manor. The ground for this Court acting between lord and tenant is, that the lord *de jure* may call upon the tenant to be admitted, if he stands out; for he has a right to the fine and his services: the tenant having all the beneficial interest not the lord. This Court will not let the parties stand in this situation, that the lord, who has his remedy against the tenant to compel him to pay the fine and perform the services, or to forfeit his estate, shall by refusing to call upon him prevent him from having evidence of his title upon the roll, which are in the lord's keeping. The Court acts in that case upon the ground of the tenant's having the beneficial interest in the land. I wish it to stand over; for in my present view of it I wish first to be informed, what my jurisdiction is. Both in cases of purchase and surrender to the use of the will the lord does by permitting the sur-

render to be entered upon the rolls partake of the trust: but that does not go the whole length of the point, I wish to be considered. I feel considerable doubt and that doubt is grounded upon the reasoning, which supports *Burgess v. Wheate*.

May 8th. The cause came on again; and the Counsel for the Plaintiff repeated their arguments in support of the bill: but no new ground was suggested.

* Lord CHANCELLOR. How do you give me jurisdiction? [* 757] Have you found any case, where a person having the legal estate, and only the legal estate, can come into this Court for any purpose? The result of *Burgess v. Wheate* is, that the grantee of the Crown had no right to a *subpoena*. I wish to know, if there is any instance of a bill sustained upon a mere legal title for an accessory to the legal estate. Here upon the state of the case you are only entitled to a legal estate, without having any very beneficial interest in the land; and you come to desire me to support the legal title by compelling the lord to admit you. If it is a legal duty, I do not know, what I have to do with it. *Burgess v. Wheate*, supposing it well decided, establishes, that if a man has got the legal estate, the Court will not take it from him, except for some person, who claims, by descent, devise, or purchase, some interest in the land: but it does not follow, that I am to give him the legal estate. In the case of *Sir Francis Cust* he had the legal estate under a will: but there was an outstanding term, which prevented him from coming to the actual possession. The purposes of it were satisfied; and he wanted to get it annexed to the legal estate. It came upon motion before Lord Northington. The bill, which was singular in its form, was a good deal scouted.

March 11th. The cause stood over till this day; when the bill was dismissed without costs (1).

1. If copyholds escheat to the crown, the disposal thereof may be directed by warrant under the king's sign manual; see stat. 39 & 40 Geo. III. c. 88, s. 12.

2. It is now settled that a *mandamus* to the lord of a manor, to admit a copyholder, claiming by descent, or making out a sufficient *prima facie* title, does lie. *The King v. The Brewers' Company*, 3 Barn. & Cress. 172; *The King v. The Lord of the Manor of Bonsall*, 3 Barn. & Cress. 175; *The King v. Coggan*, 6 East, 432. But a Court of Equity will give no sanction to the prosecution of a stale demand of this kind. *Widdowson v. Lord Harrington*, 1 Jac. & Walk. 548.

(1) As to the claim of the trustee, where the objects of the trust fail, see, also, *ante*, *Barclay v. Russell*, 42A, and *Walker v. Denne*, vol. ii. 170.

HAMMERSLEY v. PURLING.

[1798, MAY 16.]

A BOND, assigned after a secret act of bankruptcy by the assignor, as security for money, afterwards paid to his use, cannot be retained against the assignees under the commission.

THE bill stated, that Benjamin Martindale and Edward Fitch, carrying on business in partnership as wine-merchants, by indentures, dated the 8th of September, 1796, assigned to John Martindale, his executors, &c. all their joint and separate property in consideration of his undertaking to pay, and indemnifying them against all their joint and separate debts; which he thereby covenanted to pay.

John Martindale, being by virtue of the said indenture possessed of a bond by the Marquis of Stafford to B. Martindale and [*758] Fitch *for payment of 6000*l.* and interest, on the 11th of May, 1797, in order to raise money to pay the creditors of B. Martindale and Fitch, by indenture dated the 10th of October, 1796, assigned the said bond to the Plaintiffs, his bankers; and by articles of the same date it was agreed, that the said bond should remain in the possession of the Plaintiffs, their executors, &c. as a collateral security for all sums of money due or to become due from John Martindale to them.

At the execution of that indenture the balance against John Martindale in his account with the Plaintiffs did not amount to 200*l.* but between that time and the bankruptcy of John Martindale he drew from the Plaintiffs and paid in to them considerable sums; and with the money, which from time to time he received from them, he paid divers joint and separate debts of B. Martindale and Fitch amounting to about 15,000*l.* and the sums, he so received, exceeded in June, 1797, when he committed an act of bankruptcy, the sums, which he had paid in, by about 7000*l.* which sum was drawn by him for the purpose of, and was applied in, paying the said joint and separate debts; and the Plaintiffs made no objection; considering themselves secured against such balance by the said bond of the Marquis of Stafford; and they accordingly on the 13th of May, 1797, received 6300*l.* the principal and interest due thereon; and carried it to the credit of John Martindale; whereby the balance against him at the time of his bankruptcy in June following did not much exceed 500*l.* Upon the 11th of September, 1797, a commission of bankruptcy issued against John Martindale on an act of bankruptcy committed in June preceding; and upon the 19th of September, 1797, a joint commission issued against B. Martindale and Fitch, upon an act of bankruptcy previous to the date of the assignment to John Martindale. The assignees under the joint commission brought an action in the Court of Common Pleas against the Plaintiffs; and obtained a verdict for the sum, they had received upon the said bond.

The bill prayed an injunction to restrain the Defendants from taking out execution for the recovery of the said sum of 6300*l.* or for so much thereof as had been applied by John Martindale in payment of the debts of B. Martindale and Fitch; and that for that purpose an account might be taken; or if the Plaintiff should not appear entitled to such relief, that they might be *declared [*759] entitled to be allowed so much of the said sum of 6300*l.* as the estate of John Martindale is charged with by the assignees of B. Martindale and Fitch.

The bill insisted, that the Plaintiffs ought to be considered as having paid debts of B. Martindale and Fitch to the amount of the sum received by them on the bond: and having paid the same without notice of any act of bankruptcy committed by them, the Plaintiffs ought to be permitted to retain the same; and they charged, that the estate of B. Martindale and Fitch had been allowed the said sum of 6300*l.* or part thereof in account with the estate of John Martindale.

To this bill the assignees of B. Martindale and Fitch filed a general demurrer.

Solicitor General [Sir John Mitford], and Mr. Piggott, for the demurrer. The supposed Equity is, that after a verdict at law against the Plaintiff in an action for the money received upon the bond, the ground of which was, that Martindale and Fitch had committed an act of bankruptcy before the assignment of the bond to John Martindale, they may defeat the effect of that action. *Hankey's* case in the bankruptcy of Tyler was a much stronger case. It is impossible to prevent over-reaching property coming to the hands of a person after an act of bankruptcy by the owner. This deed was in itself an act of bankruptcy. The payment of a particular creditor is in fact the injury, which occasions the relation.

Attorney General [Sir John Scott], and Mr. Fonblanque, for the Plaintiffs.

John Martindale has a right to stand in the place of the creditors, he paid; and the Plaintiffs stand in his place. The question then is, whether, the Plaintiffs having that right, your Lordship will permit the assignees to take out of their hands the whole amount of the bond; or whether there is not an Equity for an inquiry, what sum would be due to the Plaintiffs in the right of the creditors so paid, and a right to deduct that sum. If so, the bill is necessary for that account, at least so far as to answer the demurrer. The Plaintiffs understanding, that Martindale and Fitch had not committed an act of bankruptcy, paid those creditors. The intention was, that those persons should not be any longer considered creditors: but they proceeded upon a mistake of their situation. The Plaintiffs have a right to say, the *money, they advanced, shall not [*760] be considered as a discharge of those debts; but that the creditors so paid shall be considered as trustees for the Plaintiffs against the estate of Martindale and Fitch. The estate of Martindale and Fitch has had the benefit of this 6000*l.* in account with the

estate of John Martindale. They are not entitled to double payment: to the bond and the amount of the bond.

LORD CHANCELLOR [LOUGHBOROUGH]. I do not see, how the Plaintiffs can stand in the place of the creditors, who have been paid. The Plaintiffs have advanced money for the benefit of Martindale and Fitch after an act of bankruptcy, of which the Plaintiffs were ignorant. If the bond had not been paid, the Defendants would have a clear right to it in an action of trover. Suppose, John Martindale had not assigned the bond, but had paid his own money; the assignees of Martindale and Fitch might have brought an action of trover. The money received upon it is purely money received to the use of the assignees. If any entry has been made allowing the estate of Martindale and Fitch this sum in account with the estate of John Martindale, being become bankrupts, that entry cannot stand; and the account must be rectified. It is impossible to make any thing of it. Allow the demurrer.

By the 47th section of the consolidated Bankrupt Act, 6 Geo. IV. c. 16, it is enacted, that *bona fide* creditors shall be admitted to prove under the commission against their debtor, notwithstanding any prior act of bankruptcy committed by him before the debt to them was contracted, provided they had neither actual nor constructive notice of any act of bankruptcy by him committed.

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- of fraud and misconduct. *Lock v. Bromley.* 40
3. Security made by a debtor insolvent, his effects under execution, and not two months before bankruptcy, upon a previous application of a creditor ignorant of those circumstances; the Lord Chancellor thought it valid; but permitted the assignees to bring an action. *Ex parte Scudamore.* 85
4. Delivery of effects in contemplation of bankruptcy to a creditor, though standing perfectly *bona fide*, is bad, if voluntary and without pressure. 88
5. Annuity by will charged upon real estate for A. for life, payable to him only, upon his own receipt and no other, and to cease immediately on alienation, ceases by the bankruptcy and bargain and sale of the estate of A. *Domett v. Bedford.* 149
6. Assignees of bankrupt taking his wife's fortune out of the Court must make a provision for her. They consented to give her half. *Brown v. Clark.* 167
7. Upon petition of joint creditors to be admitted to prove under a separate commission it was ordered, that they shall be admitted; but not to receive a dividend; and that the dividend shall be reserved, till an account is taken of what they have or might have received from the partnership effects. *Ex parte Elton.* 238
8. Joint creditor a good petitioning creditor under a separate commission. 239
9. Commission of bankruptcy is not now treated as an execution at law; for the distribution is equitable. 239
10. Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors: each estate is applicable to its own debts. 240

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11. In bankruptcy the usual directions are to apply the funds respectively ; the joint to the joint debts, the separate to the separate debts ; the surplus of each to the creditors remaining on the other. 241
12. Accommodation bills upon the bankruptcy of the drawer were fully paid by the acceptors to the holder ; who having a farther demand under the commission proved for the whole, including the bills ; he may take out of the dividend upon the bills the proportion, he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged ; the rest of the dividend on the bills belongs to the acceptor. *Ex parte Turner.* 243
13. Separate commission of bankruptcy against one partner : the other paid the joint debts : a debtor to the partnership being also a separate creditor of the bankrupt was allowed upon petition to set off against the bankrupt's share of the joint debt, and to prove the residue of his separate debt, the solvent partner consenting to receive his share. *Ex parte Quintin.* 248
14. Bankruptcy of a person, who has agreed to purchase, does not discharge the contract. 255
15. Acceptor becoming bankrupt, the petitioner having indorsed before the bankruptcy took up the bill : he may prove ; but cannot set off a debt due from him to the estate. *Ex parte Hale.* 349
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17. A person giving cash for a bill without the indorsement of the person, from whom he takes it, cannot prove it under his bank-

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- ruptcy. *Ex parte Shuttleworth.* 368
 18. Assignees of a bankrupt, Defendants in respect of an interest in his wife, cannot take it without making a provision for her. *Freeman v. Parsley.* 421
 19. The bond upon suing out a commission of bankruptcy must be by the petitioning creditor, the commission therefore was superseded on account of his infancy. *Ex parte Barrow.* 554
 20. Assignees of a bankrupt recovered in an action against the Bank stock standing in the name of the wife. 620
 21. A bond, assigned after a secret act of bankruptcy by the assignor, as security for money, afterwards paid to his use, cannot be retained against the assignees under the commission. *Hammersley v. Purling.* 757
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- BARON AND FEME.**
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 2. Trust under marriage settlement for the next of kin of the wife, subject to her appointment by will with two witnesses : appointment in favor of the husband by an unattested will being void, the children are entitled ; not the husband ; who is not of kin to his wife ; and whose claim to her personal property is not in that character under the statute, but *jure mariti* ; and in this case according to the plan of the settlement he was not intended. *Watt v. Watt.* 244
 3. Testator gave 1000*l.* stock to a married woman for her separate use, and whenever she should

* Over-ruled, *ante*, vol. i. 158, n.

BARON AND FEME—continued.

die, to be absolutely in her own power to dispose of by will or writing purporting to be her will to any person or persons, purpose or purposes, she should think proper: but in case of failure of any such disposition or appointment, to go over: this is not a power, but an absolute gift, qualified only to exclude the husband upon the death of his wife: therefore it passed by general words in her will. *Hales v. Margerum.* 299

4. Trust in a deed of separation to permit A. to receive the dividends of stock for the maintenance and support of the wife, with a covenant of indemnity to her husband: a grant by her of an annuity out of the dividends was held void. *Hyde v. Price.* 437

5. *Qu.* Whether a married woman, having a separate maintenance, can be sued as a *feme sole*.* 443

6. A married woman living apart from her husband upon a separate maintenance cannot bind him by her contracts. 445

7. Settlement upon marriage of the wife's property only upon certain trusts for the husband, wife, and children; in one event for the husband absolutely; but making no provision for the event that happened; a resulting trust for the wife. *Langham v. Nenny.* 467

8. Husband's interest by marriage in his wife's personal property, *chose in action*, or equitable interest. 469

9. Settlement of the property of a married woman, a ward of the Court, and of all the dividends and interest accrued, directed in opposition to an assignment by the husband for valuable consideration. *Like v. Beresford.* 506

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10. Dower barred by settlement previous to marriage, but during the infancy of the wife, of stock and leasehold property, partly the husband's, partly the wife's. *Chitty v. Chitty.* 545

See *Alien. Bankrupt*, 6, 18, 20. *Interest*, 4. *Marriage*, 4. *Practice*, 9. *Voluntary Settlement. Trust*, 8. *Ward of Court*.

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1. Joint bond considered as joint and several. *Thomas v. Frazer.* 399

2. Joint bond held several against creditors in the administration of assets. *Burn v. Burn.* 573

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CHARITY.

1. Where a charity cannot be executed, as directed, but the general purpose appears distinct, and may be in substance attained by another mode, it shall be executed *Cy pres*: but a personal bequest attached to a void charity, as an endowment, must fall with its principal. *Attorney General v. Whitchurch.* 141

2. The Court will not execute a power given by the testator to trustees to continue his charities or to give any others, they should think fit. *Coze v. Basset.* 155

3. In administering a charity, though a particular attention

CHARITY—continued.

fails, the general intention shall be executed *Cy pres*: therefore upon a trust for the vicars of P. provided, they should be presented at the recommendation of the trustees, the trustees, neglecting to recommend, the Chancellor, the presentation being in the Crown, presented: held, the vicar was entitled to the benefit of the trust. *Attorney General v. Boulbee.* 220

4. A college, devisee in remainder after estates for lives, in trust for purposes partly for their own benefit, and very specific with respect to them, held not to have accepted the devise by acts done merely to preserve the fund; and refusing to accept after the death of the tenants for life, the Master was directed to receive a proposal, in order to have it determined, whether it could be executed *Cy pres.* *Attorney General v. Andrew.* 633
5. Upon a devise to a good charitable use the heir has no right to the rents and profits accrued, before the devise is carried into effect. *Attorney General v. Bowyer.* 714
6. The general charitable purpose of the testator shall be executed upon the doctrine of *Cy pres*: though the particular purpose fails. *Attorney General v. Bowyer.* 714
7. An account decreed, and a receiver appointed upon the laches of the heirs, substituted by decree as trustees to execute a devise to a charity. *Attorney General v. Bowyer.* 714
8. The jurisdiction of the Court of Chancery upon Informations for establishing charities arose since the reign of Elizabeth. 726
9. Bequest to the Society for increasing Clergymen's livings in England and Wales for the perpetual purpose of increasing their livings: the Governors of

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Queen Anne's Bounty alone answer the description; and as all their funds are laid out in land, the bequest is void by the Statute of Mortmain. *Middleton v. Clitherow.* 734

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Chester not having been within the province of York at the time of Henry VIII. is not within the custom. 338

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To entitle the widow of an officer in the East India Company's service to Lord Clive's bounty, the marriage must have taken place before he retired from the service. *McKenny v. East India Company.* 203

CODICIL.—See Will 8, 31.

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COMPOSITION.—See Fraud, 3.

CONDITION.

1. A condition inconsistent with the gift is void; therefore upon a bequest to A. for life; and at his decease to his heirs, executors, &c. but if he attempts to dispose of the principal, over, he takes the absolute interest; and the condition being inconsistent with it is void. *Bradley v. Peirato.* 324
2. Condition, that tenant in fee shall not alien, or that tenant in tail shall not suffer a recovery, is void. 325

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1. The idea of supplying a surrender began after the Statute of Charitable Uses. 69

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2. Copyholder having power to bar the widow's free-bench by surrender, any act by him for valuable consideration will bar her in Equity. *Brown v. Raindle.* 256
3. Whether a Mandamus to the lord to admit to a copyhold lies, *quære.* 754
- See Parent, 1. Trust, 16. Will, 4, 15.

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Revivor for costs only on the death of the Plaintiff, entitled to them, though before the Report, and they were not to come out of a particular fund. *Morgan v. Scudamore.* 195

See Bankrupt, 2. Practice, 5.

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Construction of covenants the same in Equity as at Law: but Equity will relieve against a strict performance upon equitable circumstances, and no wilful default. 692

CREDITOR.

See Agreement, 4. Assets, 5. Bankrupt. Bond, 3. Laches, 2.

CROSS REMAINDER.

Cross remainders implied. *Burnaby v. Griffin.* 266

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Information decreed to be taken *pro confesso* upon two insufficient answers. *Attorney General v. Young.* 209

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DEED.

Though a formal mistake in a deed

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may be rectified by articles, of which it purports to be an execution, essential additions cannot be made to a conveyance from articles, of which it does not purport to be an execution: nor can the transaction be rescinded by the Court. *Mosely v. Virgin.* 184

See Illegal Contract, 6. Title-Deeds.

DEMURRER.

The ground of a demurrer must be a short point; upon which it is clear, the bill would be dismissed with costs at the hearing: therefore upon a bill by assignees of a bankrupt for specific performance of an agreement previous to the bankruptcy to grant a lease, the case consisting of a combination of circumstances, the evidence might sustain the relief with some modification: upon which a demurrer was over-ruled. *Brooke v. Hewitt.* 253

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DISCOVERY.

1. Mortgagee of an estate, partly in settlement, must discover the boundaries. 225
2. Pawnee of a bailee must discover so as to enable the owner to bring an action. 226

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Qualities of a donative. 80

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See Legacy, 3, 6, 11.

DOWER.—See Baron and Feme, 10. Election, 1, 2.

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E**ECCLESIASTICAL COURT.**

See Marriage, 4.

EDUCATION.—See Maintenance. ELECTION.

1. To compel a widow to elect to take under a will or dower, her claim to dower must be inconsistent with the will. *Strahan v. Sutton.* 249
2. Devisee dies in the life of the devisor, and the estate descends: the devisor's widow being entitled by the will to a provision in bar of dower must elect. 337
3. A., tenant in tail with power to lease, remainder to B., wife of C. in tail, conceiving himself to have obtained the fee under a void execution of a power, made leases exceeding his power; reciting, that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself or those claiming under him; A. devised the said estates and others to B. for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to her daughter and her first and other sons, and to D. and his first and other sons, successively in the same manner; and gave to B. and C. other benefits by his will; and gave the residue to D.; who filed a bill to have the will established: B. elected to take her estate tail in opposition to the will: which the Master reported to be for her benefit: After her death C., who had taken under the will, claimed as tenant by the courtesy, and brought ejectments against the lessees; some of whom had expended considerable sums upon their tenements: Upon bills by D. and the lessees the Lord Chancellor was of opinion as to the form of D.'s bill, there was great weight in the objection, that the whole was arranged in the former cause; and if there was any omission in the decree,

ELECTION—continued.

that was not the subject of an original bill: As to the merits, that though the assets of A. would be liable to the lessees upon eviction, the benefit of putting a party to election does not extend to a residuary legatee; and that neither D. as a disappointed devisee, nor *a fortiori* the lessees, could raise that equity against C. holding as tenant by the courtesy under the election, that B. had made, to take her estate tail against the will of A. The bill of D. therefore was dismissed; and that of the lessees retained, in order that, when they should have ascertained their damages, they might have satisfaction from the assets of A.; part of which had been received under his will by C. *Earl of Darlington v. Pulteney. Lady Cavan v. Pulteney.* 384

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EQUITABLE ESTATE.

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EQUITABLE RECOVERY.

1. An equitable recovery will not bar a legal estate. 125
2. A legal estate in the equitable tenant to the *præcipe* is no objection to an equitable recovery. 126
3. Devise to trustees and their heirs in trust to receive and pay over rents and profits to A., a *feme covert*, for life, for her separate use; and after her decease to convey to her daughters, as tenants in common in tail; remainder over: A. takes an equitable estate for life; and may by lease and release make a tenant to the *præcipe* for an equitable recovery: each daughter takes a vested estate, when she comes *in esse*; subject to be divested, as the number in-

EQUITABLE RECOVERY—continued.

creases; the conveyance in execution of the trust need not wait the death of A. *Burnaby v. Griffin.* 266

4. Analogy between legal and equitable recoveries. 276

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1. Legacy to Mrs. G. Evidence admitted. *Abbott v. Massie.* 148

2. A declaration of uses by the founder of a charity presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date: the book being kept by the trustees for entering their proceedings; and containing an order by the trustees, dated six years after creation of the trust, that the declaration be then entered as a direction to the trustees. *Attorney General v. Boulbee.* 220

See Agreement, 3. Frauds (Statute of), 1, 2. Legacy, 3, 6. Practice, 3, 18, 19, 20. Satisfaction, 2.

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An exception of the thing that is the subject of the gift is void. 325

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Executor, refusing to act, cannot take a legacy to him as executor. *Abbott v. Massie.* 148

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EXECUTORY TRUST. — See Trust, 10.**EXONERATION.**

A party bound to elect between two funds, having mortgaged one elects the other; the former must be taken subject to the mortgage, but shall be reimbursed by

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the latter. *Rumbold v. Rumbold.* 65

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Tenant in tail with reversion in fee levying a fine, lets in the reversion; but suffering a recovery bars it and all incumbrances, and gains a new fee. 675

FIRE.—See Landlord.**FORECLOSURE. — See Infant. Mortgage, 7. Practice 8.****FOREIGN STATE.**

See Jurisdiction, 3, 4. Trust, 11.

FRAUD.

1. Bill for specific performance of an agreement to grant a lease to the Plaintiff would, on evidence of his fraud, misrepresentation, and insolvency, have been dismissed with costs, if not compromised. *Willingham v. Joyce.* 168

2. This Court having jurisdiction *in personam* upon equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies by a creditor under his own execution was, upon the circumstances, held only a security for the debt, the expenses of the proceeding, and incumbrances paid by him, with interest; and subject thereto a reconveyance was decreed. *Lord Cranstown v. Johnston.* 170

3. Upon a deed of composition, one creditor was prevailed upon by the debtor to represent his debt below the real amount; receiving notes for the dividend upon the remainder, and bonds for the remainder of his debt beyond the amount of the dividend, upon the bill of the debtor and

FRAUD—continued.

a creditor, party to the deed, the bonds were decreed to be delivered up: but the Court was of opinion the Defendant would be entitled to the benefit of the notes, after all the trusts of the deed were satisfied; though not as against the creditors; and directed an inquiry as to that, reserving the question. *Eastbrook v. Scott.* 456

4. Creditor, at the desire of his debtor, about to marry, gives in a false account of his demand to the father of the intended wife: after the marriage the creditor is bound even as against the debtor. 461

See Bankrupt, 2. Frauds (Statute of), 2. Voluntary Settlement.

FRAUDS (STATUTE OF.)

1. Agreement in writing between landlord and tenant, signed by the landlord, for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed: but blanks were left for the day of the commencement: the repairs being completed, the landlord tendered a lease to commence from that time; and on refusal filed a bill: the answer admitted, that the agreement was accepted; but insisted that the new lease was not to commence till the expiration of the old; and so it was decreed; parol evidence being refused. *Pym v. Blackburn.* 34

2. Provision by will increased upon evidence of the testator's request to the executor and residuary legatee and his promise; upon which the testator refused to make a new will; and said, he would leave it to the generosity of the executor. *Barrow v. Greenough.* 152

3. Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stat-

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ing improvements made at a considerable expense, and continuance of possession after the expiration of the old lease and payment of an increased rent under the agreement: plea of the Statute of Frauds ordered to stand for an answer with liberty to except. *Wills v. Stradling.* 378

4. Trust raised by implication from letters, and a paper referred to by them, and in the hand-writing of the party, though not signed or dated; and by operation of law from advances of money. *Forster v. Hale.* 696

5. The Statute of Frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it. *Ib.*

6. The Court has gone too far in taking cases out of the Statute of Frauds on the ground of part-performance of an agreement: the relief ought to have been confined to compensation. 712

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Grant to be taken as strongly in favor of the objects and against the grantor, as fair inference can allow. 48

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HAND-IN-HAND FIRE-OFFICE.

Under the constitution of the Hand-in-Hand Fire-Office, the heir, to whom upon the death of the insured the property being freehold descended, cannot have the benefit of the policy without assignment. *Mildmay v. Folgham.* 471

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1.

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1. Bill indorsed to a broker in consideration of money paid by him in effecting insurances, one of which was illegal: the acceptor becoming bankrupt, the petition of the indorsee to prove was dismissed as to what arose upon the illegal insurance; and the bankruptcy being some years ago, an inquiry was directed as to the rest. *Ex parte Mather.*

373

2. A. employed by B. to buy smuggled goods pays for them; and they come to the hands of B.: B. shall not pay for them.

373

3. Stock transferred as a security for a floating balance, and under an agreement to continue it transferred and re-transferred by the creditor by way of loan: held a sale. *Ex parte Denison.*

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4. Contract to be jointly concerned in ship insurances is void by Statute 6 Geo. I. c. 18, s. 12, though the policies are subscribed by the underwriters in their separate names: but though the contract could not be executed, the Court would not exclude the result of it in decreeing a general account.* *Watts v. Brooks.*

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5. Insuring each other is not within Stat. 6 Geo. I. c. 18, s. 12.

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6. A man cannot set up his own illegal act to avoid his own deed.

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7. Smuggling transactions or illegal dealings in stock shall be brought into an account: though

* The latter decision over-ruled.

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the Court would not execute the contract.

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INJUNCTION.

1. Injunction; that the validity of a patent might be tried at law: verdict for the patentee, subject to the opinion of the Court upon a case: the court equally divided: the patentee must bring another action: but the Court will not impose any terms upon him nor dissolve the injunction in the mean time. *Boulton v. Bull.*

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2. Injunction against securities obtained by one French Emigrant against another by arresting him, when about to sail on the expedition against France, and under an obligation entered into in France as surety: which according to the Laws of France could not affect the person. *Talleyrand v. Boulanger.*

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1. A legacy from an uncle to a niece to be paid at twenty-one or marriage does not carry interest before the time of payment. *Crickett v. Dolby.*

10

2. Legacy from a parent to a child bears interest before the time of payment, and from the death of the testator; and is the only instance.

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3. Legacy payable at twenty-one; before which time the legatee dies: if interest is payable, his executor shall have the legacy immediately: if not, he must

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- wait, till the legatee would have been twenty-one; and cannot then have the interest. 13
4. A wife as well as a child is within the exception to the rule, that a legacy does not bare interest, till it is payable. 16
5. Legacy from parent to child payable *in futuro*: if maintenance is given generally, it shall carry interest: but if an annual sum less than the interest is given for maintenance, the executor paying that shall have the rest. 17
6. Interest allowed upon a written agreement to pay by instalment. *Parker v. Hutchinson.* 133
7. Interest given at law upon a written undertaking to pay, or notes payable, on a day certain: not upon notes payable at a day uncertain, shop debts, &c. 135
8. Upon the ground of an express maintenance and other indications of the intention the Lord Chancellor inclined to the opinion, that the rule for interest upon a legacy, given by a parent to a child, till the time of payment was not applicable: but the bill of the children was dismissed upon circumstances of acquiescence, laches, and the consequent difficulty of taking the accounts. *Mitchell v. Bower.* 283
9. Portions under a settlement for younger children were increased by the will of the father: there being an express maintenance of 2 *per cent.* upon the original portion, the rule for interest upon the legacies does not apply: but the Court continued the 2 *per cent.* upon them. *Long v. Long.* 286
10. Interest by way of maintenance upon a legacy in the case of parent and child only. 287
11. Bond and judgment assigned: interest must be calculated to the date of the report, so as not

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- to exceed the penalty. *Sharpe v. Earl of Scarborough.* 557
- INTESTACY.**—See Assets, 6. London, (Custom of.) Representatives.
- ISSUE.**
1. Under a legacy to the issue of A. all descendants are entitled; and take *per capita* as joint-tenants. *Davenport v. Hanbury.* 257
 2. Grand-children entitled under a bequest to issue. *Freeman v. Parsley.* 421
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JOINT BOND.—See Bond, 1, 2.

JOINT CREDITOR.

- A joint creditor by simple contract may go against the assets of a deceased partner; but cannot before the account retain separate property of that partner in his possession. *Stephenson v. Chiswell.* 566
See Bankrupt, 7, 8, 10, 11, 13. Set-off.

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JOINT-TENANT.

1. Covenant by joint-tenant to sell severs the joint-tenancy in Equity, though not at law. 257
2. Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance, as "equally among" &c. or an inference of that sort arises in Equity from the nature of the transaction; as in partnerships, a joint mortgage, &c. *Morley v. Bird.* 628
3. Bequest to two without words of severance: they take jointly. *Stuart v. Bruce.* 632
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JURISDICTION.

1. No equity upon eviction to recover purchase-money. 235
2. After verdict upon a bond against the obligor, bill to have it delivered up, charging the consideration to have been an agreement by the Defendant to cohabit with the Plaintiff as his wife; and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery: demurrer allowed. *Franco v. Bolton*. 368
3. Confiscation by a foreign country is a subject of political, not municipal, discussion. It cannot operate upon property in this country. 429
4. Q. Whether a foreign sovereign can sue in a municipal Court of this country. 431
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1. *Eaton v. Lyon*. 690
2. Laches does not apply to a large body of creditors. *Whichcote v. Lawrence*. 740
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1. Tenant covenanting to keep and leave the premises in repair must rebuild in case of fire. *Pym v. Blackburn*. 34
2. Right of renewal forfeited by the laches of the tenant. *Baynham v. Guy's Hospital*. 295
3. The court leans against a construction for perpetual renewal, unless clearly intended. *Baynham v. Guy's Hospital*. 295

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1. Legacy payable at twenty-one; before which time the legatee dies: a person claiming by limitation over takes immediately: but the administrator of the infant must wait till the time, at which the legacy is payable, unless the whole interest is given. 15
2. Legacy charged upon real estate and payable at a future day sinks as to the real estate by the death of the legatee before the time of payment; and the assets cannot be marshalled. *Pearce v. Loman*. 135
3. The rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence of an intended substitution. *Allen v. Callow*. 289
4. Legacy to A., in case she shall be living with the testatrix at her decease, with limitations over upon the death of A. before twenty-one or marriage, fails by the death of A. in the life of the testatrix. 294
5. A legacy upon an express contingency, which never happened, failed, notwithstanding the apparent intention in favor of the legatee. *Holmes v. Craddock*. 317
6. The rule, that legacies to the same persons by different instruments shall be accumulative repelled by internal evidence and the circumstance, that, all the legatees by the first instrument were legatees in the second, except those, who were dead, or had quitted the testator's service. *Barclay v. Wainwright*. 462
7. The distinction between a legacy given at twenty-one and one

LEGACY—continued.

payable at twenty-one is a positive rule of the Ecclesiastical Court, adopted as to personal legacies, but not as to real estate; and not approved, or to be extended. 543

8. Legacy by will: the same sum given by codicil to the same person upon a contingency was held additional. *Hodges v. Peacock*. 735

9. Legacy to A. if he be living, and in case of his death before B. to C. is contingent, viz. if A. survives B. *ib.* 735

See Assets, 10, 12. Evidence.

Interest, 1, 2, 3, 4, 5, 8, 9,

10. Parent and child.

Specific Bequest, 2. Vested Interest, 1.

LENGTH of TIME.—See Laches.

LIEN.—See Agreement, 4. Trust, 11.

LIMITATION OVER.

Condition not to be extended to a limitation over. 320

LONDON (CUSTOM OF.)

Husband dying intestate, the widow is bound by her contract not to claim under the custom of London. 330

LORDS.—See Appeals.

LUNATIC.

Bankruptcy of the committee of the person of a lunatic is a sufficient cause for removing him on account of the fund for maintenance; but the custody of the person will not be changed, if the Master finds it proper with regard to the comfort of the lunatic, that it should continue. *Ex parte Mildmay*. 2

M**MAINTENANCE.**

1. Bill for discovery, whether the Plaintiffs were not employed by one Defendant, a Peer, as solicitors to present and prosecute a petition on behalf of the other

MAINTENANCE—continued.

Defendant, complaining of a return of a member of Parliament; and praying, that he might be declared duly elected: demurrer allowed on grounds of public policy, and because the discovery could have no effect, and principally, because such transaction would amount to maintenance at common law. *Wallis v. The Duke of Portland*. 494

2. Maintenance justifiable from the privity of the parties in estate, or their connection, as master and servant. 503

MAINTENANCE AND EDUCATION.—See Interest, 5, 8, 9, 10. Parent and Child, 1. Vested Interest, 10. Will, 2.

MANDAMUS.—See Copyhold, 3. **MARRIAGE.**

1. Condition in restraint of marriage under twenty-one without consent of trustees established both as to a rent-charge out of real estate and a personal legacy. *Stackpole v. Beaumont*. 89

2. Ground of the favor to marriage by the civil law. 96

3. Condition by will, requiring consent of trustees to marriage, not applicable to the second marriage of a natural daughter, who had married between the date of the will and the death of the testator, having approved it, and was a widow at his death. *Crommelin v. Crommelin*. 227

4. The Spiritual Court has exclusive cognizance of the rights and duties arising from the state of marriage: a Court of Equity therefore has no jurisdiction upon a contract for separation between husband and wife simply; much less where it will affect a purchaser or creditor; but the jurisdiction holds in special cases: as where a third party covenants to indemnify the husband against the wife's

MARRIAGE—continued.

debts; or a fortune accrues to the wife after separation; or the property is the subject of a trust. *Legard v. Johnson.* 352

See Fraud, 4.

MARSHALLING.—See Legacy, 2.

MASTER.—See Maintenance, 2.

MERGER.

Where the equitable and legal estates equal and co-extensive unite in the same person, the former merges: therefore where the former descends *ex parte paterna*, the latter *ex parte materna*, upon their union the paternal heir has no equity. *Selby v. Alston.* 339

See Trust, 4.

MISTAKE.—See Agreement, 3. Bond, 1. Deed, 1. Will, 4, 25, 26, 29, 30, 34, 49.

MORTGAGE.

1. Bill against the devisee of mortgaged premises by the heir of mortgagor for discovery and redemption; charging acknowledgments, that the estate was held in mortgage, and that accounts had been kept: plea of possession for fifty years under conveyances from the mortgagee ordered to stand for an answer. *Lake v. Thomas.* 17

2. A mortgaged estate getting into different hands, redemption was refused as to part from length of time, and opened as to the other part; accounts having been kept, and there being a devise of it as a mortgage. 22

3. Mortgagee cannot have an account of rents and profits received by the mortgagor; though the security being upon an estate for lives is become insufficient. *Colman v. The Duke of St. Albans.* 25

4. Estate sold subject to a mortgage was exonerated in favor of the heirs by the personal estate of the purchaser; his acts having clearly made it his personal debt. *Woods v. Huntingford.* 128

MORTGAGE—continued.

5. Mortgaged estate descends; the mortgagee pressing, the security is assigned: a mere covenant by the heir upon that occasion for payment does not make it his personal debt. 131

6. A mere covenant by the purchaser of a mortgaged estate to indemnify the vendor, does not make it his personal debt. 131

7. A trustee laid out the money of different persons on a mortgage: foreclosure by one *cestuy que trust* as to his share. *Montgomerie v. The Marquis of Bath.** 560

8. Lands originally held under old mortgages pass by a general devise; though no release of the equity of redemption appears. *Attorney General v. Bowyer.* 714

See Agreement, 4. Discovery, 1. Exoneration. Infant, 1. Joint Tenant, 2. Practice, 8. Will, 33.

N

NATURAL CHILD.—See Parent.

NEXT OF KIN.—See Baron and Feme, 2. Representatives.

NOTES.—See Interest, 7.

NOTICE.—See Purchaser. Registry Act.

O

OFFICE.—See Register's Office.

OFFICER'S WIDOW.

See Clive's (Lord) Bounty. Pension.

P**PARENT AND CHILD.**

The Court will not supply a surrender for a natural child; but, if it has a legacy from the father

* *Qu.* See the note, p. 561.

PARENT AND CHILD—*continued.*
payable at twenty-one, will allow
maintenance. 12

See Interest, 2, 4, 5, 8, 9, 10.
Satisfaction, 1, 3, 4.

PAROL AGREEMENT.—See
Frauds (Statute of), 3, 6. Part-
ner, 1.

PAROL EVIDENCE.—See Evi-
dence.

PART PERFORMANCE.

See Frauds (Statute of), 3, 6.

PARTNER.

1. Bill by partner under a parol
agreement, charging miscon-
duct in the other partner, and
praying a dissolution, account,
and injunction from executing
securities in the name of the
firm: demurrer to the prayer
for a dissolution, because there
was no writing between them,
over-ruled. *Master v. Kirton.*
75

2. Bankers upon a deposit of
money with them gave notes
bearing interest: the partner-
ship was dissolved: one of the
partners soon afterwards died,
and his creditors were called by
advertisement: another partner-
ship was formed by the survivors
and others, who re-issued notes
of the former partnership, and
paid the interest of the deposit-
notes for near two years, when
they failed: the assets of the de-
ceased partner are not dis-
charged. *Daniel v. Cross.* 277

3. Partners bound by an instrument
executed by one in the presence
of the others. 578

See Joint Creditor. Joint
Tenant, 2.

PARTY.—See Practice, 1, 8. Title.

PATENT.—See Injunction, 1.

PAWNER AND PAWNEE.

See Discovery, 2.

PEER.—See Maintenance, 1.

**PENSION TO WIDOWS OF OF-
FICERS.**

To entitle the widow of an officer
in the army to the pension from
Government, the marriage must

**PENSION TO WIDOWS OF OF-
FICERS**—*continued.*

have taken place, before he re-
tired from the service. 204

PERPETUITY.

A limitation of personal property
after a disposition, that would
raise an intail express or im-
plied in real estate, is void; and
the person, who would be tenant
in tail, takes the absolute in-
terest. *Chandless v. Price.* 99

See Trust, 10. Will, 42, 50.

PERSONAL ESTATE.—See As-
sets.

**PETITION UPON ELECTION TO
PARLIAMENT.**

Party presenting and attending a
petition to the House of Com-
mons cannot by setting up the
engagement of another person,
deliver himself from the expense
of his own suit. 500

See Maintenance, 1.

PLEADING.

1. Bill charging, that the Defend-
ants had got the title-deeds and
mixed the boundaries, prayed a
discovery, possession, and an
account: demurrer allowed.
Loker v. Rolle. 4

2. Bill stating generally, that under
some deeds in the custody of
the Defendants, Plaintiff was
entitled to some interest in some
estates in their possession, pray-
ed a discovery, and delivery of
the title-deeds, possession of the
estates, and an account: demur-
rer to the whole bill allowed.
Ryves v. Ryves. 343

3. The answer need not set forth
an account, where the ground,
upon which it is prayed, is de-
nied: as where the bill charged
a dealing in pictures by com-
mission, and the answer denied
that; and stated, that the De-
fendant sold them to the Plain-
tiff in the course of this trade.
Marquis of Donegal v. Stewart.
446

4. The office of a pleader is, not
to make a case, but to state it

PLEADING—*continued.*

fairly according to his instructions. 501

See Agreement, 3. Frauds (Statute of), 3. Mortgage, 1. Use, 1.

PORTIONS.

Settlement on marriage to the use of the husband for life ; remainder to trustees for 500 years in trust after the death of the husband and not before, unless with his consent as therein mentioned, to raise portions for younger children, to be paid in such shares and at such times as the husband and wife should appoint ; in default of appointment, to be paid, if but one besides an eldest or only son, 5000*l.* ; if two, 6000*l.* ; if three, 8000*l.* ; and if four or more, 10,000*l.* equally, to be paid respectively at twenty-one, or marriage of daughters if after the age of sixteen, if such times of payment happen after the death of the husband ; if in his life, then within twelve months after his decease, and not before, unless with such consent : provided, that if any of such younger children should die before his, her, or their portions should become payable, so that the number should be reduced to less than four, no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children equal to the sum originally limited for the portion or portions of such child or children, if one, two, or three. Three younger children only survived their father : but more than four had attained twenty-one. The sum to be raised is 10,000*l.* *Willis v. Willis.* 51

See Interest, 9. Satisfaction, 1, 2, 3, 4. Will, 41.

POWER.—See Baron and Feme, 3. Charity, 2. Will, 39, 40, 43.

PRACTICE.

1. Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement, when the Plaintiff joined in transferring the stock into his name : demurrer, because the *Cestuis que trust* were not parties, over-ruled with costs. *Franco v. Franco.* 75
2. The Court will not interfere with the Master's appointment of a consignee unless upon special grounds and a strong case. *Bowersbank v. Colasseau.* 164
3. A single witness cannot prevail against a positive denial by the answer. *Lord Cranston v. Johnston.* 170
4. Bill by devisees in trust to sell for specific performance of an agreement to purchase : that the heir of the devisor is not a party to the suit is not matter of exception to the report in favor of the title. 234
5. Exception over-ruled with costs. *Burnaby v. Griffin.* 266
6. The bill praying an inquiry into the title and a specific performance, on the Defendant's motion after answer an inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient : but the Court would not decide upon any matter of relief. *Moss v. Matthews.* 279
7. Relief against forfeiture of the deposit upon putting the other party in the same situation, as if the contract had been performed at the time agreed. *Id.*
8. The Court ordered a bill of foreclosure to stand over, to make a judgment creditor, the only incumbrancer not before the Court, a party ; but would not adopt as a general rule the usual practice to make all incumbrancers parties. *Bishop of Winchester v. Beavor.* 314

PRACTICE—continued.

9. A married woman living in America being entitled to a legacy, a commission to examine her would have been directed; but as she had been examined under a commission issued by the American Government, that was considered sufficient. *Campbell v. French.* 321
10. Where there is only one Defendant, after all the process of contempt for want of an answer the bill may be ordered to be taken *pro confesso* upon motion. *Seagrave v. Edwards.* 372
11. The Court cannot decree against a title in the Crown apparent on the record, though not insisted on at the hearing. *Barclay v. Russell.* 424
12. A Court of Law could not give judgment against the title of the Crown appearing on the record. 436
13. Defendant in confinement under sentence for felony cannot be brought up by *Habeas Corpus* upon an attachment for want of an answer. *Rogers v. Kirkpatrick.* 471, 573
14. The Court will not control the Master's appointment of a receiver without a special case. *Anonymous.* 515
15. Defendant on motion ordered to pay in a balance ascertained by the report. *Gordon v. Rothley.* 572
16. Exception to the Master's appointment of a receiver disallowed. *Wilkins v. Williams.* 588
17. Under the order 18th June, 1668, regulating the office of Six Clerks they are entitled to receive their proportion of the fee from the sworn clerk, though he has given credit to the client. *Ex parte The Six Clerks.* 589
18. After a decree the Master may examine witnesses; but ought not to do so by his clerk; the same *Subpœna* issues as to bring

PRACTICE—continued.

- them before the examiner; which is the same as a *Subpœna* to answer, but the label expresses the purpose; upon an examination in the country the body of the writ expresses, that it is to testify. *Parkinson v. Ingram.* 603
19. The decrees in the Exchequer always express, that the officer is to be armed with a commission to examine witnesses, and power to direct the same to the country; so formerly in Chancery. 607
 20. After a decree, if the Master see cause for a commission to examine witnesses in the country, he certifies, that it is necessary; and the depositions, when returned, are filed by the Six Clerks: but depositions taken before the Master are kept in their offices. 607
- See Title.

PRESUMPTION.—See Evidence, 2.

PRIVILEGE.

1. A party attending an arbitrator under an order of the Court is privileged from arrest. *Moore v. Booth.* 350
2. The privilege of a bankrupt from arrests during his examination extends to an attachment for not paying money under an award made a rule of Court. *Ex parte Parker.* 554

PURCHASE.—See Bankrupt, 14. Baron and Feme, 9. Jurisdiction, 1. Will, 43.

PURCHASER, WITHOUT NOTICE.

Bill by tenant for life in possession for discovery and delivery of the title-deeds: plea a mortgage in fee by a former tenant for life, alleging himself to be seised in fee, without notice, ordered to stand for an answer with liberty to except. *Strode v. Blackburne.* 222

Q

QUEEN ANNE'S BOUNTY.

See Charity, 9.

R

REAL ESTATE.—See Assets.
Charge.

RECEIVER.

The trustee cannot be receiver.

Anonymous. 515

See Practice, 14, 16. Sequestration, 2.

RECOMMENDATION BY WILL.

See Vested Interest, 3.

RECOVERY.

See Equitable Recovery. Fine.

REDEMPTION.—See Mortgage.**REGISTER'S OFFICE.**

Qu. Whether the office of Register of the Court of Chancery is assignable.* 334

REGISTRY ACT.

A registered conveyance of premises in Middlesex for valuable consideration established against a prior devise not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient. *Jolland v. Stainbridge.* 478

RELATIONS.—See Will, 20, 21.

REMAINDER.

See Cross Remainder. Equitable Recovery, 1. Limitation over. Tenant for Life, 1.

REMOTE LIMITATION.

See Perpetuity.

RENEWAL.

See Landlord and Tenant, 2, 3, 4.

REPRESENTATIVES.

1. Money settled in trust to be paid according to the appointment of A. and in default thereof to his legal representatives according to the course of administration: A. by will in pursuance of the power appoints to his legal representatives according to the course of administration; and makes a residuary legatee, whom he appoints one of his executors. Upon the will the next of kin are entitled. *Jennings v. Gallimore* 146

* See *post*, vol. v. 433.

REPRESENTATIVES—continued.

2. Testator gave his wife real and personal estate in bar, full satisfaction, and recompense of all dower or thirds, which she can have or claim in, out of, or to, all or any part of his real and personal estate, or either of them; he gave the residue to four persons; and afterwards by a codicil he directed them to dispose thereof in charities: part of the residue being invested in real securities goes according to the Statute as undisposed of; and the widow is not barred. *Pickering v. Lord Stamford.* 332, 492

3. Testator gave real and personal estate to one daughter in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate; he also gave a provision to his wife in full of her dower, thirds, or other claim at Law or in Equity or by any local custom to any other part of his real or personal estate: the residue to his other daughter: upon her death in his life he by codicil gave it according to the appointment of his wife: the power not being duly executed, the residue goes according to the Statute as undisposed of; and the widow and daughter are not barred. 335

4. Devise to A. and his wife for life; and after the death of the survivor, upon trust to sell and apply the produce to and among all and every the issue child or children of A. by his said wife and their representatives equally: the fund belongs to the children surviving the testator, but the issue of a daughter, who died in the life of A. are entitled as representatives against the claim of their father as administrator. *Horsepool v. Watson.* 383

5. Neither an heir at law nor next of kin can be barred by any

REPRESENTATIVES—continued.

thing but a disposition. 493

See Baron and Feme. 2.

London, (Custom of).

Will, 42.

REPUGNANCY.—See Will, 17, 28.

RESIDUARY LEGATEE.

See Election, 3. Representatives, 1.

RESULTING TRUST AND USE.

See Baron and Feme, 7. Representatives, 2, 3. Trust, 7.

8, 14. Use, 2. Will, 44.

REVIVOR.

See Charity, 7. Costs, 1. Trust, 13.

REVOCATION.

See Specific Bequest, 1. Will, 51, 52, 53, 54, 55, 56.

S

SATISFACTION.

1. Slight circumstances are laid hold of to get rid of the rule, that a legacy to a creditor extinguishes the debt : but a little difference between a portion and a legacy to a child as to the time of payment shall not prevail against the presumption of satisfaction. 466

2. Portions for children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended : the presumption is not rebutted by slight circumstances : accounts in the testator's hand-writing were admitted as evidence of the circumstances, under which he made his will ; but not to explain the will. *Hinchcliffe v. Hinchcliffe.* 516

3. The Court will lay hold of any circumstances to get out of the rule, that a debt is satisfied by an equal legacy. 529

4. Portions for children by the will of the parent held a satisfaction of a provision by settlement upon the intention : slight circumstances of difference, that

SATISFACTION—continued.

would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. *Sparkes v. Cator.* 530

5. A negotiable bill of exchange not satisfied by a legacy. *Carr v. Eastabrooke.* 561

6. Nothing presumed in favor of the rule, that a debt is satisfied by a legacy equal or greater. 564

SEPARATE CREDITORS.

See Bankrupt, 10, 11, 13. Set-off.

SEPARATION.

See Baron and Feme, 4, 5, 6.

SEQUESTRATION.

1. Bill for an account taken *pro confesso* against surviving executor and devisee in trust ; and leasehold estates taken under a sequestration for want of an answer : the Court would not order the sequestrators to sell ; but directed them to apply the profits. The Court also ordered the dividends of money in the bank on the testator's account to be paid under the will ; but could not order the bank to transfer before the Act 36 Geo. III. c. 90. *Shaw v. Wright.* 22

2. Appointment of a receiver in the place of the sequestrators discharges the sequestration. *Id.*

3. The Court will sell perishable commodities, rents paid in kind, or the natural produce of a farm, under a sequestration. 23

SERVANT.—See Maintenance, 2. **SET-OFF.**

At law there can be no set-off between joint and separate debts. 248

See bankrupt, 13, 15.

SIX CLERKS.—See Practice, 17. **SMUGGLING.**

See Illegal Contract, 2, 7.

SPECIFIC DEVISE AND BEQUEST.

1. Bequest of stock : if the testator has it at the time, it is specific ; and any act destroying it proves an intention to revoke. If a

SPECIFIC DEVISE AND BE-TITLE—*continued.*QUEST—*continued.*

ring or a picture bequeathed cannot be found, that cannot be rectified. 310

2. Specific legacy of stock decreed according to the value at the time, it ought to have been transferred. *Morley v. Bird.* 628

See Assets, 12. Will, 58.

SPECIFIC PERFORMANCE.

See Agreement.

SPIRITUAL COURT.

See Marriage, 4.

STOCK.—See Illegal Contract, 3, 7.

Specific Devise, 2.

SURRENDER.—See Copyhold.

Parent and Child. Will 4, 15.

SURVIVORSHIP.—See Will 37.

T

TENANT.—See Landlord.

TENANT IN COMMON.

"Equally" makes a tenancy in common. 260

See Joint-tenant, 2. Vested Interest, 4. Will, 37.

TENANT FOR LIFE.

1. Tenant for life having made a lease of coal-mines amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction. *Wentworth v. Turner.* 3

2. Tenant for life liable to waste having sold timber cannot prevent the vendee from cutting it. 3

See Equitable Recovery, 3.
Purchaser, without Notice.
Title-Deeds.

TENANT IN TAIL.

See Fine. Will 47.

TIMBER.—See Tenant for Life, 2.
Waste.

TITLE.

Bill by devisees in trust to sell for specific performance of an agreement to purchase: exception to the report in favor of the title, that the persons entitled to the purchase-money, subject to debts, legacies, and other

charges, were not parties to the suit: the Lord Chancellor was of opinion, they ought not to be parties to the conveyance: and if they were, their covenant ought to extend only to their own acts and those of the devisor; not to a general warranty, without a special contract for it: but as the point must come properly upon objections to the conveyance, the exception was over-ruled upon the form. Exception, that the persons entitled to the purchase-money subject to the charges, were not parties to the conveyance, over-ruled. *Wakeman v. The Duchess of Rutland.* 233, 504

TITLE-DEEDS.

Title-deeds are incident to the possession of a freehold estate. 225

See Pleading, 2. Purchaser, without Notice.

TRUST AND TRUSTEE.

1. The Court will decree a specific chattel to be delivered up without measuring the value, where, from its nature, there can be no compensation by damages. In this instance, the Defendant retained possession after the expiration of a limited time, for which he had received it upon a special trust and an express engagement to restore; and an action, which had been brought, was rendered ineffectual by the release of two of the owners combining with the defendant. *Fells v. Read.* 70

2. Under a commission of charitable uses it was agreed, that copyhold lands formerly surrendered for maintenance of a minister in W. chapel should be let, and the rents employed towards maintenance of the minister to be chosen and appointed by the inhabitants, and presented and allowed by the lord of the manor; who upon com-

TRUST AND TRUSTEE — *continued.*

plaint might give the minister half a year's warning; and if he had not reformed by that time, might remove him; the information prayed that the lord might be decreed to allow and approve the candidate, who had the majority of votes: which was refused on the ground of misconduct; and the evidence clearly proving it, a new election was directed; upon which the same candidate being returned, and producing strong affidavits of good conduct for the last six years, the decree stating the affidavits declared, that in consequence of them the relator deserved the approbation of the trustees. *Attorney General v. The Marquis of Stafford.* 77

3. A limitation that will create an entail at law, will have the same effect upon an equitable estate; therefore a devise in fee to pay debts, and then to the use of A. in trust for B. for life, remainder to the heirs male of his body, is an estate-tail in B. *Brydges v. Brydges.* 120
4. To create a merger of the equitable in the legal estate by their union, the interest in each must be the same; an equitable recovery therefore barred an equitable remainder in tail in the person, who had the whole legal fee. *Brydges v. Brydges.* 120
5. Analogy between legal and equitable estates. 127
6. Trustees having laid out the fund upon a bad security obtained from the debtor under circumstances unfavorable and to the prejudice of other creditors a charge on his estate under a power; their bill to enforce the charge against the son, tenant in tail under the marriage settlement, was dismissed with costs. *Bradbury v. Hunter.* 187, 260

TRUST AND TRUSTEE — *continued.*

7. Real and personal estate devised to the executor in trust to pay debts and legacies; the rest and residue to himself; the only purpose of devising the real appearing to be to insure payment of the debts, without any intention to disinherit the heir, it was held only a charge; and that the heir was entitled to the surplus of the real estate. *Halliday v. Hudson.* 210
8. Settlement of the wife's estate to such uses as the husband and wife or the survivor should appoint by deed or will with three witnesses; in default thereof, to the heirs of the husband: the wife surviving made a disposition by her will to a charity, and therefore void; decreed to the heir of the husband. *Attorney General v. Ward.* 327
9. No act of the trustee can vary the right of the *cestuy que trust*: but his situation may; as where the *cestuy que trust* is his heir, the right to dower depends upon which dies first. 341
10. Covenant in a marriage settlement to settle leasehold estates in trust for such persons and such and the like estates, ends, intents, and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders: the Court in executing the covenant declared, that no person should be entitled to the absolute property, unless he should attain twenty-one, or die under that age leaving issue male. *Duke of Newcastle v. The Countess of Lincoln.* 387
11. Bank stock was purchased by the Government of Maryland before the American war, and vested in trustees for the discharge of certain bills. After the peace upon a bill under an

TRUST AND TRUSTEE — *continued.*

assignment by the new State of part of the stock, as a compensation to mortgagees of lands, that were confiscated, the fund, subject to that assignment, was claimed by the new State; and, there being no claim under the bills, the whole was claimed by the surviving trustee beneficially; also by the proprietary under the old Government; and a specific lien was insisted on in respect of losses by confiscation occasioned by the refusal of the trustees to transfer; held, that there was no lien; that the new State could take only such rights of the old as were within their jurisdiction; that the claims of the Plaintiff, the State, and in respect of the confiscations, were the subject of treaty, not of municipal jurisdiction; and the fund, no object of the trust existing, must be at the disposal of the Crown. *Barclay v. Russell.* 424

12. Executors directed with all convenient speed to pay debts and lay out the residue in mortgages held not answerable for a loss by the insolvency of the testator's banker, after selling negotiable securities deposited with him by the testator. *Rowth v. Howel.* 565

13. Receiver not liable by the failure of the testator's banker at Bristol; with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it. 566

14. Devise upon a future contingency; and no intermediate disposition of the rents and profits; a resulting trust for the heir. 725

15. There is no general rule, that a trustee to sell shall not be himself the purchaser; but he shall not thereby gain profit to him-

TRUST AND TRUSTEE — *continued.*

self; one of several trustees to sell having purchased, and afterwards sold at a profit, was therefore decreed to account for that profit with costs. *Whichcote v. Lawrence.* 740

16. Devise of a copyhold (duly surrendered) to A. and his heirs in trust for B. and his heirs: upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him; and his bill was dismissed without costs. *Williams v. Lord Lonsdale.* 752

See Bank of England. Baron and Feme, 4. Charity, 4. Equitable Recovery, 3. Frauds (Statute of), 4, 5. Merger. Practice, 1. Receiver. Will, 1.

U

USE.

1. At Common Law the use was intended to be in the feoffee or conusee; and is not averred; as it must be, if to the use of the feoffer, &c. 666
2. Conveyance by one seized *ex parte materna*: the use results in the same manner: so, if expressly limited to him. 667

V

VESTED INTEREST.

1. Legacy to be paid at a particular time is *debitum in presenti solvendum in futuro* and vested. 13
2. By settlement on marriage, reciting an intention to provide for the wife and children certain tolls were granted for the remainder of the grantor's term, in trust to raise an annuity for the lives of the wife and her mother and the survivor: then reciting, that the remainder of

VESTED INTEREST—*continued.*

the term might expire in the life of the wife of her children, therefore to make a provision for her and her children by her then, or any future husband, the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise after the deaths of the grantor and the mother of the wife 100*l.* annually, to be placed out in the purchase of freehold lands or hereditaments, or leasehold estates, for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in Government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased, or the interest, produce, and profits, to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life; and after her decease to apply the said rents and profits or interest-money towards the support and maintenance of such child and children of her, as should be living at her death, till the youngest should be twenty-one; and then to be possessed of such estates so to be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child or children, in such shares and proportions, payable at twenty-one, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof to the use of all such children, equally to be divided at their respective ages of twenty-one: but if she should die without issue leaving any child or children, or all should die under twenty-one, then to the use of the grantor, his heirs,

VESTED INTEREST—*continued.*

executors, administrators, and assigns; and after paying the said annuities, to be possessed of all the surplus money arising from the said tolls during the remainder of the term for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a year: and laid out in stock the sums received and the produce. One son was the only issue. He attained twenty-one in life of his mother, and survived her. The Court would not invest the fund in land: but held it with the accumulations from the death of the grantor and the future payments a vested interest in the son at twenty-one; and as personal estate belonging to his administrator. *Swann v. Fonnereau.* 41

3. Bequest to A. for life, with power on her marriage to appoint the interest to her husband for life, and a recommendation to dispose of the principal part after her own death and the determination of the preceding trusts among the children of B., the recommendation being held an absolute trust, it is a vested interest in all the children, subject to be devested by appointment; and there being no appointment, children born after the death of the testator, and those who died in the life of A., are entitled with the rest. *Mahm v. Barker.* 150

4. Legacy to A. for life: and after her decease to her children; if she should leave none, to B. and C. share and share alike, or to the survivor: a vested interest in B. and C. upon the death of the testator as tenants in common; A. though she survived them, dying without children. *Perry v. Woods.* 204

5. Legacy of stock to A. to be laid

VESTED INTEREST—*continued.*

out in annuity for her life : A. died two days after the testator and before any alteration of the stock : her administrator is entitled to a transfer. *Barnes v. Rowley.* 305

6. Testatrix gave to A. the dividends of 500*l.* stock, till he should attain the age of thirty-two : at which time she directed her executors to transfer the principal to him : the legacy does not vest till the age of thirty-two. *Batsford v. Kebbell.* 363

7. Legacy in trust for testator's mother and sister for life ; and after the death of the survivor for all and every the child and children of his sister living at her death share and share alike, each receiving his or her share of the principal at twenty-one ; and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one : the payment only is postponed, not the vesting. *Wadley v. North.* 364

8. Charge upon land payable at a future day not vested till the time of payment. *Phipps v. Lord Mulgrave.* 613

9. Remainder subject to appointment is vested, liable to be devested. 661

10. Trust by will for all the children of A. when and as they shall severally attain sixteen ; with a direction for maintenance : those born after the eldest attained sixteen were excluded : maintenance was directed without regard to the father's ability. *Hoste v. Pratt.* 730

See Equitable Recovery, 3. Will, 9, 14, 23, 37.

VIDELICET.—See Will, 17.

VOLUNTARY SETTLEMENT.

Settlement after marriage of stock standing in the name of the wife, the husband being insolvent, and soon after a bankrupt, set aside

VOLUNTARY SETTLEMENT
—*continued.*

upon the bill of the assignees after the death of the husband : the stock did not survive : but was decreed to the assignees, subject to a provision for the widow. *Pringle v. Hodgson.* 617

W

WARD OF COURT.

Husband committed for marrying a ward of the Court, and discharged under particular circumstances on undertaking to make a settlement, was held to that, and not permitted upon her consent to receive her whole fortune, viz. a rent-charge for life. *Stackpole v. Beaumont.* 89

WASTE.

A. tenant for life, remainder to his sons successively in tail male : remainder to B. for life and to her sons in the same manner, with trustees to preserve contingent remainders : A. being also seized of the reversion in fee cut and sold timber before the birth of a tenant in tail : afterwards B. had a son, who died soon after his birth, and another son, who survived A. The produce of the timber was decreed to be laid out in the funds during the life of A. and upon his death without having had a son was decreed to be laid out in land, to be settled to the uses of the estate, upon which the timber was cut. *Powlett v. The Duchess of Bolton.* 374

WIDOW.—See Copyhold, 2. Election, 1, 2. London (Custom of.) Representatives, 2, 3.

WIDOW (OFFICER'S).—See Lord Clive's Bounty. Pension.

WIFE.

See Baron and Feme. Ward of Court.

WILL.

1. The testator gave the residue of

WILL—continued.

his personal estate to his wife, desiring her to provide for his daughter A. out of the same, as long as she, his wife, should live, and at her decease to dispose of what shall be left among his children in such manner as she shall judge most proper. There is not an absolute trust for the children after the death of the wife. *Pushman v. Filliter.* 7

2. Testator gave his wife 400*l.* a-year in addition to 500*l.* a-year under her settlement, in consideration of the expense and care she would incur in the maintenance of their children: she must maintain them, when at home; but is not to be charged with education, or maintenance at school. *Collier v. Collier.* 33
3. Legacy in trust to pay out of the interest 60*l.* a-year to the testator's wife for life, and the remaining interest during her life to R. Duke of M. and in case of his death to his eldest or only son; and for want of issue male to his eldest or only daughter; for want of such issue female to sink into the residue; and after the death of his wife the testator gave the principal to the said Duke, if then living; but if then dead, to his eldest or only issue male then living; and for want of such issue male to his eldest or only daughter; for want of such issue female to sink into the residue. R. Duke of M. died leaving two sons and a daughter: both the sons died: the eldest left a son, Duke of M. who filed the bill. The Plaintiff is entitled to the surplus interest: but the principal is contingent till the death of the testator's widow. *Duke of Manchester v. Bonham.* 61
4. Testator devised all the residue of his estates as well copyhold as freehold " (the copyhold part thereof having been previously

WILL—continued.

surrendered to the use of my will)" upon several trusts in favor of his wife and children: the only trust for his eldest son and heir was an annuity of 300*l.* for life; remainder to his wife and children: the testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect; and was not bound by receiving half a year's payment of the annuity, while abroad. *Rumbold v. Rumbold.* 65

5. Contingent legacy out of real and personal estate payable two years after the event: by codicil the testator reciting, that he found his estate would not bear that payment during the life of A. being chargeable with an annuity for her life, declared, he revoked that part of his will; and that the said legacy upon the same event was to be paid twelve months next after the death of A. and not before. A. dying before the contingent event, the legacy is not payable till the expiration of the two years after it. *Wordsworth v. Younger.* 73
6. Testator devised his real estate to the eldest of his three natural daughters and her husband for their joint lives and that of the survivor; remainder to her sons successively in tail male; remainder to the second and her husband and issue male in the same manner; remainder to the youngest, or such person as she should first marry, (if under twenty-one, with consent of trustees,) for their joint lives and that of the survivor, with similar remainders: he also gave a rent-charge limited in the same manner to the second, her husband and issue male; and gave

WILL—continued.

- a similar rent-charge to the youngest, until she shall marry (under and with the restriction above-mentioned) or for her life; and when she shall marry as aforesaid, upon the same trusts; and having given the second 10,000*l.* on her marriage he gave the youngest a legacy of 10,000*l.* payable, 5000*l.* upon her marriage (with such consent as aforesaid) and 5000*l.* two years after. Upon her marriage without consent the condition being established against the husband does not affect her estate for life in the rent-charge. *Stackpole v. Beaumont.* 89
7. The Court is bound to give effect to all the will. 105
8. Codicil to be taken as part of the will. 110
9. Testator gave the interest and produce of the residue to his two sisters for their lives; and after their decease the principal to be paid to their children, share and share alike; but whichever died before the other, then the share so paid to her to be paid to her children in equal proportions: but if she should leave no children, then the interest and produce to be paid to the survivor for her life as aforesaid. One sister died without leaving children: the survivor is entitled to the interest for life; and the principal is vested in all her children. *Taylor v. Langford.* 119
10. Testator directed, that his wife should have liberty to occupy his house for a year, provided she continues so long in L.: then by a distinct clause he directed his executors to pay her a guinea a-week during her stay at L. Her residence there beyond the year does not entitle her to a continuation of the weekly payment. *Walker v. Watts.* 132

WILL—continued.

11. A general charge of debts and legacies upon all the real estates of the testator not annulled by a subsequent power to sell a particular estate only and apply the produce to the same purpose; but that estate was first applied. *Coze v. Basset.* 155
12. Construction of a will and several very inaccurate codicils upon a disposition of the personal estate, as to the interest, whether absolute or for life; as to the extent, whether general, or specific and exempt from debts. *Ib.*
13. Though the testator has charged his real estate with debts in aid of the personal, the personal may be given exempt from the debts by an unattested codicil. *Ib.*
14. Testator gave his sister M. and his brother W. the interest of the residue equally; at the death of M. one half of the principal to her children; her husband by no means to have any part, but to be entirely for the children; if none, to W.'s children; and after the death of W. and his wife the other half to his children; and he excluded his eldest brother from any benefit: M.'s life interest is not to her separate use: the interest of the other moiety during the lives of W. and his wife would have vested in W. and therefore lapsed by his death in the life of the testator. *Brown v. Clarke.* 166
15. Devise of all freehold and copyhold lands " (the copyhold part whereof I have surrendered to the use of my will) " subject to debts: some were surrendered; others not; the latter did not pass. *Wilson v. Mount.* 191
16. A person entitled under a will and also paramount and against it must elect. *Ib.*

WILL—continued.

17. A *videlicet* shall be rejected if repugnant: not, if it can be reconciled and made restrictive. 194
18. Testator gave all his wagon-ways, rails, staiths, and all implements, utensils, and things, at his death used or employed with in or for the working, management, or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held, used or enjoyed, with the collieries: under this bequest and upon the circumstances money due from the fitters and others and in the Tyne Bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire engines, and various other articles of the stock in trade, passed.* *Stuart v. Earl of But.* 212
19. "I return to A. his bond" in a will is, not a release, but a legacy; and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland v. Adair.* 231
20. Residue bequeathed to relations in the proportion the testator had given the other part of his fortune: pecuniary legatees only are entitled: not a devisee of real estate. *Ib.*
21. Bequest to relations does not include those by marriage. *Ib.*
22. Bequest to the youngest child of A. if she should have any child or children within a certain period; if no child or children within that period, then over: her eldest child, being the only one within the period described, is entitled. *Emery v. England.* 232
23. Vesting of a legacy postponed to the time of payment, and a limitation over in nature of a

WILL—continued.

- cross-remainder implied from the general intention; reversing a decree, that it vested at twenty-one. *Mackell v. Winter.* 236, 536
24. Devise in fee and bequest of personal estate to A. and in case of his death under twenty-one without leaving issue, to B.: codicil affirming the will in all respects except by directing, that A. shall not be entitled till twenty-five: A. dying between the ages of twenty-one and twenty-five without issue, B. has no title. *Scott v. Chamberlaine.* 302, 491
25. Testator gave a sum, part of his 4 per cent. Bank Annuities, to his wife for life, and after her decease to several relations. Evidence was admitted, that he had no such stock at the date of the will, having previously sold it all, and invested the produce in Long Annuities, and to show the cause of the mistake; and the legacies were established. *Selwood v. Mildmay.* 306
26. Testator bequeathed part of his 3 per cent. Consolidated Bank Annuities. Upon evidence, that he had no Bank Stock at the date of his will or at his death, but that he had 3 per cent. South Sea Annuities, the legacy was established out of that fund. *Dobson v. Waterman.* 308
27. Under a bequest of the use of a house, with all the furniture and stock of carriages and horses and other live and dead stock for life, plate passed; wine and books did not. *Porter v. Tournay.* 311
28. Words not to be rejected, unless repugnant to the clear intention manifested by other parts of the will. 320
29. Testator by his will gave legacies to A. and B., describing them as grand-children of C., and their residence in America:

* Reversed, *post*, vol. xi. 657.

WILL—continued.

- by a codicil he revoked these legacies, giving as a reason, that the legatees were dead: the fact not being true, they were held entitled upon proof of identity. *Campbell v. French.* 321
30. Legatee entitled notwithstanding a mistake of his name., 322
31. The construction of the will being, that the real estate was well charged in aid of the personal with legacies, even supposing the charge not general so as to include future legacies, a legacy may be revoked and given to another person by an unattested codicil. *Attorney General v. Ward.* 327
32. Testatrix by codicil gave to A. the legacy given by her will to the children of B., "as I know not whether any of them are alive and if they are well provided for;" though they are living, B. is entitled; the construction being, that if they are living they are well provided for. *Ib.*
33. The legal estate in mortgaged premises did not pass by a general residuary devise by the mortgagee. *Duke of Leeds v. Munday.* 348
34. Testator gave 100*l.* in trust to pay the interest to A. till her Daughter B. shall attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother B. This legacy decreed to the daughter at the age of twenty-four. *Clarke v. Norris.* 362
35. Testator in India gives all his estate and effects to A. in England in trust, and directs his property to be remitted to him; and after several legacies he gives A. 800*l.*, and requests him, as soon as the property is remitted, to lay out the same in the funds or other securities, which shall appear most advantageous for those who shall be

WILL—continued.

- benefited by it hereafter: the 800*l.* is a beneficial legacy, not in trust. *Wadley v. North.* 364
36. Limitation over upon the death of a person unmarried and without issue: "unmarried" in its usual sense meaning never having been married, "and" was construed "or" to afford a reasonable construction. *Maberly v. Strode.* 450
37. Words of survivorship added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent. *Ib.*
38. Real estate devised to be sold and the produce disposed of with the personal, with a power to direct the fund to be laid out in land: no such direction having been given, it was held personal property. *Ib.*
39. Power not executed by general words in a will. *Langham v. Nenny.* 467
40. Estate given to such uses as A. shall appoint is a fee. 470
41. Trust term in a will to raise out of real estate several sums; of which some were secured by the testator's bond and covenant; the intention being to give them as portions out of the land, not as debts or legacies, the personal estate is not applicable. *Reade v. Litchfield.* 475
42. Leasehold property bequeathed in remainder in trust for a child *in ventre*, if a son, for life; and after his decease, for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator: a son being born and dying without issue, the limitation over was established in favor of the next of kin according to the statute at the time of distribution. *Long v. Blackall.* 486

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43. Purchaser decreed to take a title under an obscure will amounting to a power to sell; the legal estate not being given descends to the heir till execution of the power; and then passes to the vendee. *Warneford v. Thompson.* 513
44. Devise to A. and her heirs; but if she dies under twenty-one and unmarried, to B. and her heirs: A. dies in the life of the testator, under twenty-one, and without issue, but having been married: the heir is entitled. *Chitty v. Chitty.* 545
45. Bequest by implication. *Wainwright v. Wainwright.* 558
46. Money bequeathed to be laid out in land to be settled upon the testator's nephew A. for life: remainder to the wife of A. for life; with remainders in tail to the sons and daughters of A. by such wife; A. was not married till after the death of the testator: held to extend to a second wife. *Peppin v. Bickford.* 570
47. Money bequeathed to A. to remain at interest or to be by him laid out in real estates, to go with other estates devised. A. being tenant in tail of the real estate, and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will: the Court inclined in favor of the disposition upon the ground, that A. might have called for the money as absolute owner: but it was established upon the option to continue it personal estate. *Amler v. Amler.* 583
48. Testator directed his children generally to be maintained during the life of his wife, but distributed the property after her death in words, which would not comprise after-born sons: they were held entitled to the

WILL—continued.

- former provision. *Matchwick v. Cock.* 609
49. 10,000*l.* provided by settlement for one daughter or younger son; 15,000*l.* if more: there being but one daughter, the father by a will under a power reserved to him appoints the time of payment and the application of the interest of the 15,000*l.* provided for her by settlement, and gives her the farther sum of 5000*l.*: she was held entitled to 20,000*l.* *Phipps v. Lord Mulgrave.* 613
50. Bequest of personal estate after a contingent limitation in tail, which did not take effect, established. *Phipps v. Lord Mulgrave.* 613
51. Devise by tenant in fee, in case he should die without leaving any issue living at his decease, and subject to such jointure or jointures, as he might make upon the woman he might marry: by lease and release previous to the marriage of the devisor, the devised estates were conveyed to trustees and their heirs as to part, subject to certain trusts to the use of the devisor and his heirs till the marriage; and afterwards, subject to other trusts, to the use of him for life; remainder to trustees to preserve, &c.; remainder subject to farther trusts, to the use of the first and other sons of the marriage in tail male; remainder to the devisor in fee; and as to the other part, to the use of the devisor till the marriage; and afterwards, subject to a jointure to the intended wife, to the use of the devisor in fee: by an article executed previously to the will in contemplation of the said marriage, provisions were made as the basis of a settlement of the same nature, but in certain respects different from that, which

WILL—continued.

- was executed: the will is revoked as to the whole estate both in law and equity: a settlement having been made previously to the marriage, the articles were laid out of the case; and parol evidence of an intention not to revoke was rejected. *Holford v. Cave.* 650
52. Revocation of a will by a conveyance never completed. 653
53. Lease for years or life is a revocation of a will *pro tanto* only. 653
54. Mortgages in fee and conveyances in fee for payment of debts revoke a will *pro tanto* only in equity. 654
55. If testator makes a feoffment after the will to the use of himself in fee, or suffers a recovery, it is a revocation. 664
56. By a mortgage in fee of a devised estate or a conveyance in

WILL—continued.

- fee for payment of debts, the will is revoked *pro tanto* only. *Earl Temple v. The Duchess of Chandos.* 685
57. As to the effect of a limited use of articles, which are consumed by the use, *quære.* 314
- See Assets, 1, 2, 3, 4, 5, 10, 11, 12. Bankrupt, 5. Baron and Feme, 3. Charity. Condition, 1. Evidence. Legacy. Marriage, 3. Mortgage, 8. Representatives. Satisfaction. Specific Devise. Trust, 7. Vested Interest.

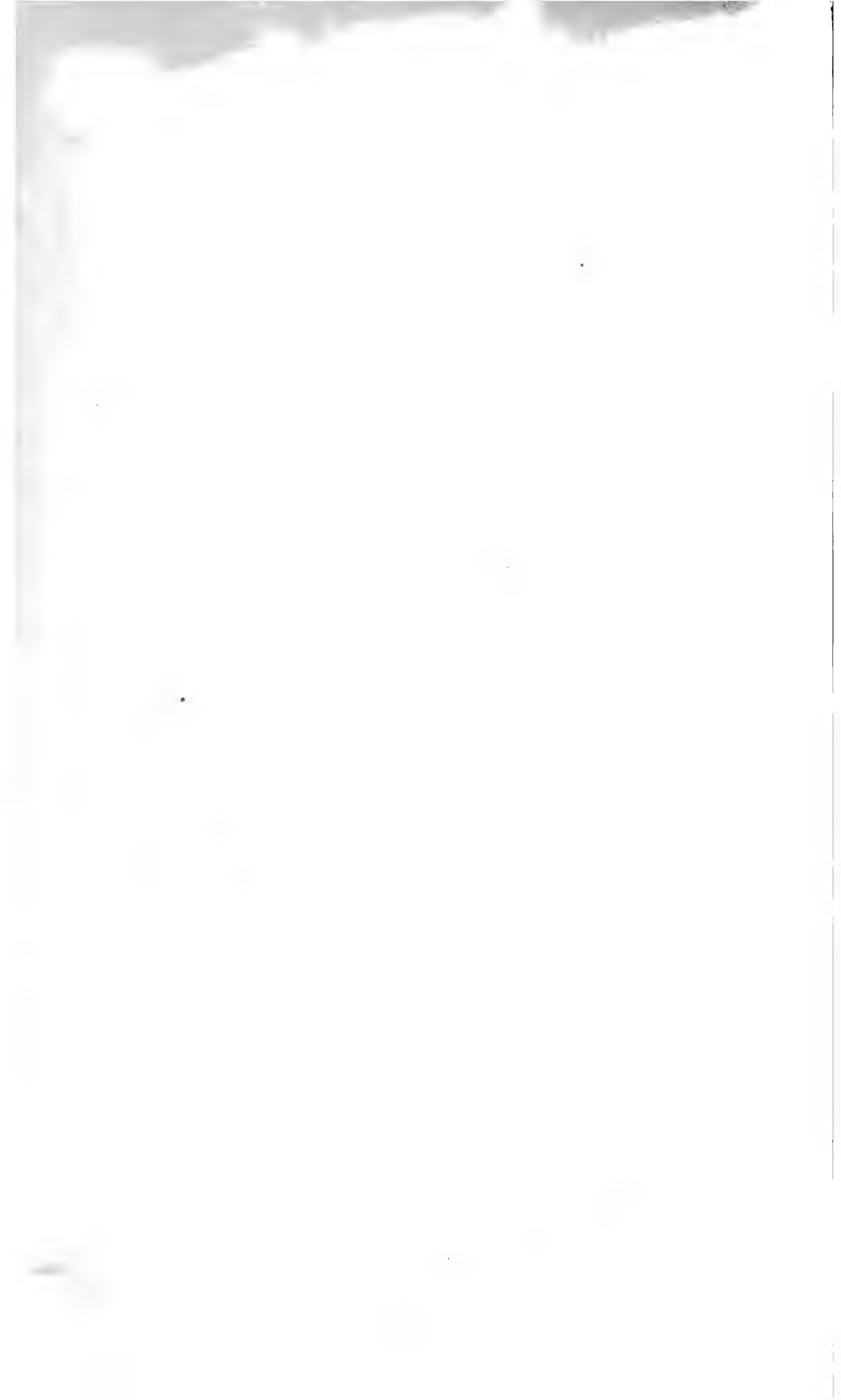
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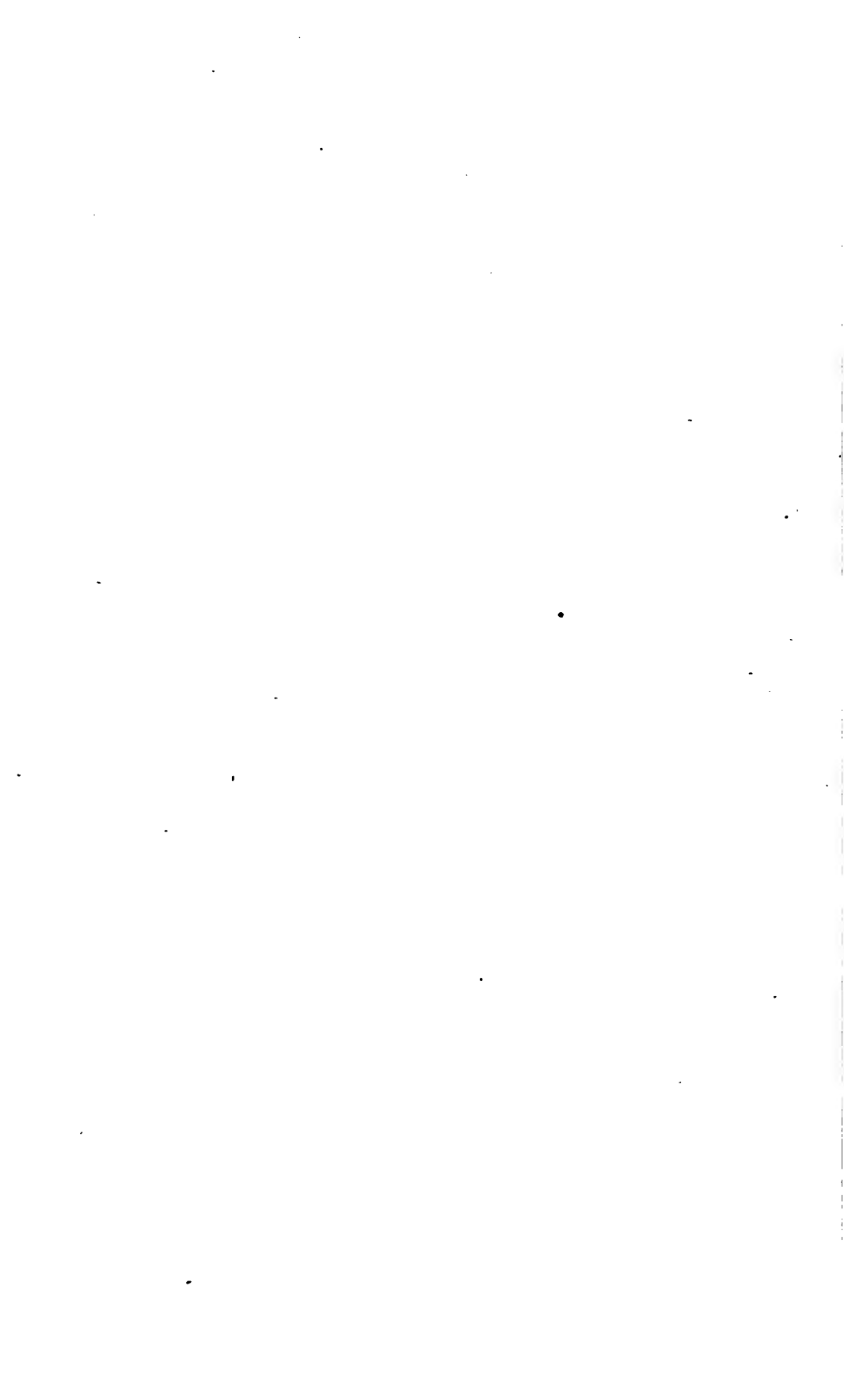
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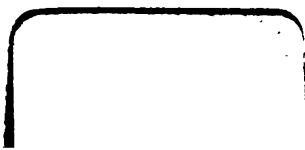




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